TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 200.

MT. VERNON-WOODBERRY COTTON DUCK COMPANY ET AL., PLAINTIFFS IN ERROR,

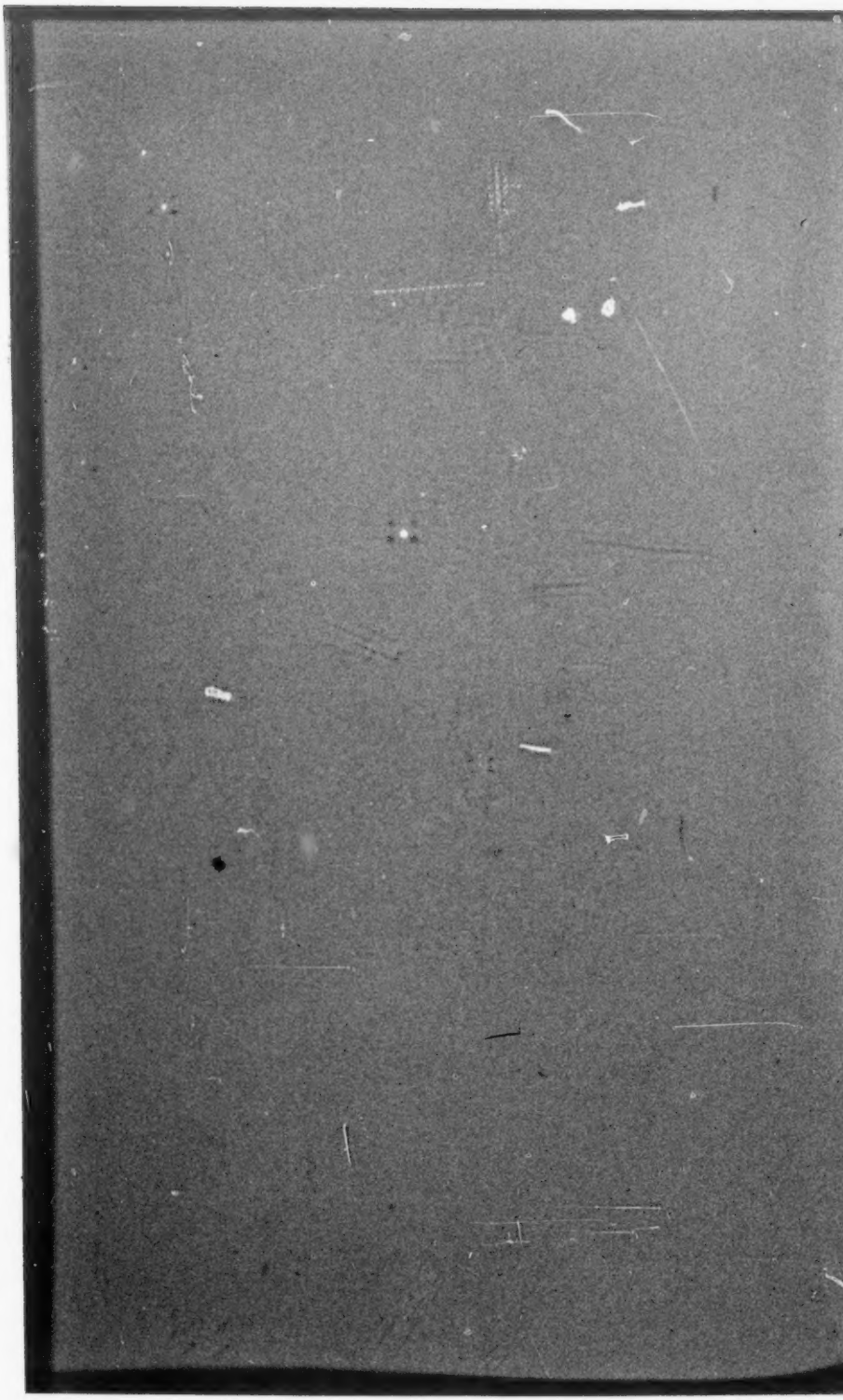
vs.

ALABAMA INTERSTATE POWER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED JULY 9, 1914.

(24,306)



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1 *Petition for Rule Nisi.*

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY et al.
vs.
ALABAMA INTERSTATE POWER COMPANY.

To the Honorable S. L. Brewer, Judge of the Circuit Court, Tallapoosa County, Alabama:

Your Petitioners, the Mount Vernon-Woodberry Cotton Duck Company, a corporation under the laws of the State of Delaware, the Continental Trust Company, a corporation under the laws of the State of Maryland, as Trustee, the International Trust Company of Maryland, a corporation under the laws of the State of Maryland, as Trustee and the Tallassee Falls Manufacturing Company, a corporation under the laws of the State of Alabama, and the Consolidated Cotton Duck Co., a corporation, respectfully state:

First. That on to-wit, the 25th day of May, 1912, the Alabama Interstate Power Company claiming and alleging itself to be a corporation under the laws of the State of Maine, filed its petition in the Probate Court of Tallapoosa County, Alabama against your petitioners and Sigmund M. Lehman, as trustee and Philip Lehman, as Trustee as will more fully appear from the copy of said petition hereto attached marked Exhibit "A" and made a part hereof—said petition disclosing the trust relation sustained by said Continental Trust Company and International Trust Company of Maryland as also the relation of trust sustained by Sigmund M. Lehman and Philip Lehman.

Second. Petitioners state on advice of counsel that said Probate Court of Tallapoosa County is without jurisdiction to grant the relief prayed in said petition or that in granting the same said Probate Court would exceed its jurisdiction in this:

(1) In that the statutes of Alabama under which said rights are claimed, to-wit, Sections 3627-3637 of the Code of Alabama confer no right to condemn any portion of the dam of any other corporation or to condemn lands on which to erect a power house for the
2 use of water to be derived from the condemnation of any part of such dam.

(2) The statutes of Alabama under which said rights are claimed, to-wit, Sections 3627-3637 of the Code of Alabama are inoperative if they confer the right sought in said petition in that neither said statutes nor Chapter 79 of said Code furnish any means whereby the excess of water, water power or water rights made liable to condemnation, can be ascertained or valued.

(3) That the statutes of Alabama under which said rights are claimed, to-wit, Sections 3627-3637 of the Code of Alabama, are, if they confer said rights, unconstitutional and void as opposed to the constitution of the State of Alabama in that they authorize the condemnation of said property and property rights when the same are

owned by a corporation, but do not authorize such condemnation when such property belongs to persons other than a corporation.

(4) That the statutes of Alabama under which said rights are claimed, to-wit; Sections 3627-3637 of the Code of Alabama, are, if they confer said rights, unconstitutional and void, as opposed to the Fourteenth Amendment to the Constitution of the United States (the protection of which is hereby claimed) in that they deny to your petitioners equal protection of the laws by authorizing the condemnation of said property and property rights when they are owned by a corporation and withholding such rights of condemnation when said property is owned by persons other than a corporation.

(5) The Statutes under which said rights are claimed, to-wit, Sections 3627-3637 of the Code of Alabama, are, if they confer said rights, unconstitutional and void as opposed to the Fourteenth Amendment of the Constitution of the United States (the protection of which is hereby invoked) in that such condemnation will deprive your petitioners of their property without due process of law.

(6) The Statutes of Alabama under which said rights are claimed, to-wit, Sections 3627-3637 of the Code of Alabama, are, if they confer said rights, opposed to the Fourteenth Amendment of the Constitution of the United States (the protection of which is hereby invoked) in that they deny to the defendant to said condemnation proceedings any right of appeal prior to the assessment of damages, as will stay any such assessment and as will enable said defendant to revise the judgment of the Probate Court granting the prayer of said petition.

(7) The statutes of Alabama under which said rights are claimed, to-wit, Sections 3627-3637 of the Code of Alabama, are, if they
3 confer said rights, unconstitutional and void as opposed to Sections 23 and 235 of the Constitution of the State of Alabama, in that said statutes deprive the defendants to said petition of the right to stay the final condemnation of and entry upon said property, pending an appeal to the Circuit Court and pending a right of trial by jury of twelve men in respect to the assessment of damages.

(8) It appears from said petition that said Alabama Interstate Power Company is a corporation and that it is seeking to condemn the property of other corporations, having similar powers, in use on the same stream, and it does not appear that such condemnation is necessary.

(9) The statutes of Alabama under which said rights are claimed, to-wit, Sections 3627-3637 of the Code of Alabama, are, if they confer said rights, unconstitutional and void as opposed to Section 23 of the Constitution of Alabama in that it appears from said petition that the plaintiff is a corporation other than municipal and that it is sought to condemn said property without the consent of the owner and that the property and property rights sought to be condemned are other than "the right of way over the lands of other persons or corporations."

(10) It appears from said petition that the purpose for which said property is sought to be condemned, is one which as to your petitioners is unauthorized by law, to-wit, the purpose to impound the waters

of the Tallapoosa River by a dam to be erected at or near Cherokee Bluff, so as afterwards to furnish said waters for use by defendant.

(11) It appears from said petition that the property sought to be condemned has no relation to the original enterprise of the plaintiff at Cherokee Bluff, and that the ownership of at least one acre of land on each and opposite sides of the Tallapoosa River, at Cherokee Bluff, confers upon the plaintiff no right to condemn any of the defendant's property which is sought to be condemned.

(12) It appears from said petition that the property sought to be condemned is situated several miles, to-wit, ten miles below the place where the plaintiff proposes to erect its plant at or near Cherokee Bluff, on the same stream, and it does not appear from said petition that there is any such physical relation between said original enterprise at Cherokee Bluff and the property sought to be condemned, as would authorize the condemnation thereof.

(13) The statutes of Alabama under which said condemnation is sought, to-wit, Sections 3627-3637 of the Code of Alabama, are, if they confer said rights unconstitutional and void as opposed
4 to the Constitution of the United States and of the State of Alabama (the protection of which is hereby invoked) in that such condemnation would deprive your petitioners of their property without due process of law.

(14) It appears from said petition, that, with the claimed ownership of at least one acre of land on each and opposite sides of the Tallapoosa River at or near Cherokee Bluff, as a predicate, said plaintiff is seeking to condemn the property of your petitioners situated many miles down the stream from the point where said two acres are located, and that the property so sought to be condemned has and is to have no physical relation to said enterprise at Cherokee Bluff. And petitioners thereupon aver that if the statutes of Alabama under which said proceeding is instituted confer any such rights as are claimed in said petition, said legislation is arbitrary, oppressive and against common right and deprives the owner of his property without due process of law and without necessity therefor; and is confiscatory in its nature.

(15) Said petition discloses on its face that it authorizes no such condemnation as is sought therein.

(16) Said petition fails to show that the condemnation sought is authorized by law.

(17) It appears from said petition that if the same be granted it would prevent the owner of said water power from further utilizing the waters impounded by its dam in generating any additional power which might become necessary by additions to its machinery or plants.

(18) The statutes conferring jurisdiction to condemn property upon the Probate Court are unconstitutional as violative of Section 149 of the Constitution of Alabama.

Third. And your petitioners address each of the foregoing grounds from one to eighteen, inclusive to so much of said petition and separately to that part of said petition as seeks or in which it is sought to condemn a section of your petitioners' dam; and avers that said

Probate Court is without jurisdiction of said petition in said aspect or would exceed its jurisdiction in granting said petition in said aspect. And petitioners add to said grounds the following additional grounds:

(*a*) No statute of Alabama authorizes the condemnation of any part of such dam erected and in use by another corporation.

(*b*) No statute of Alabama authorizes any corporation to condemn to its own use jointly with the owner thereof any such dam as is described in said petition.

5 Fourth. And petitioners address each of the foregoing objections from one to eighteen inclusive, separately and severally to so much of said petition as seeks to condemn to its use the railroad already constructed, described in said petition. And petitioners aver that said Probate Court has no jurisdiction to grant the prayer of said petition in said aspect or would exceed its jurisdiction if it granted the same. And petitioners add the following to said ground addressing the same to said portions of said petition, to-wit:

(*c*) No statutes of Alabama authorize the condemnation of any part of a railroad to the joint use or ownership of the condemning party and of the owner.

(*d*) No statute of Alabama authorizes the condemnation of the right to use a railroad already constructed and in use.

Fifth. And petitioners address each of said grounds of objections numbered from one to eighteen, inclusive to so much of said petition as seeks to condemn certain lands therein described as a site for a power house.

Sixth. And your petitioners address each of said eighteen grounds separately and severally to so much of said petition as seeks to condemn a right of way for a railroad to said power house and to so much of said petition separately and severally as seeks to condemn other rights of way on said property and separately and severally to so much of said petition as seeks to condemn lands for transmission lines and sub-stations. And in this last connection petitioners add to the grounds already stated the following:

(*e*) It appears that said plaintiff has not constructed a dam or power house and therefore that it has no need to condemn any land for transmission lines or sub-stations.

(*f*) It appears from said petition that the lands sought to be condemned to use for transmission lines and sub-stations are referred to in said petition to transmission lines and substations having relation to said power house which it is proposed to erect on the condemned lands; and there being no right to condemn for said power house, no right exists to condemn for said substations or transmission lines.

(*g*) There is no sufficient description in said petition of any land sought to be condemned for use as a sub-station, to confer jurisdiction to condemn the same.

(*h*) There is no description in said petition of any land
6 sought to be condemned for a transmission line.

Seventh. And petitioners interpose said grounds of objections numbered from one to eighteen inclusive to each aspect of said petition and in respect to each peice of property sought to be con-

demned therein, as if the same was separately enumerated and set forth.

Eighth. Petitioners further state that it appears from said petition in the Probate Court that the water or water rights sought to be condemned are in use for power purposes upon the same water course by another corporation having similar powers to those of the plaintiff and essential to its operations, and that said property is not, therefore subject to be condemned by plaintiff.

Ninth. It does not appear from said petition but that the land, water or water rights held by the Mount Vernon-Woodberry Cotton Duck Company for power purposes, in themselves and taken alone or in connection with other lands, water or water rights owned by said corporation, can be made the reasonable basis of a water power development of at least one thousand continuous horse power.

Tenth. It appears from said petition that the property sought to be condemned has already been subjected to a public use to-wit, to the production of power for the operation of the plant of said Mount Vernon-Woodberry Cotton Duck Company and it is not alleged that any actual necessity for the specific land or portion thereof or interest therein sought to be condemned, exists.

Eleventh. Petitioners aver that prior to the filing of said petition, a copy of which is hereto attached marked Exhibit "A," the Alabama Interstate Power Company filed in said Probate Court a petition to condemn the same property and interest in property as are sought to be condemned in said proceeding copied in Exhibit "A" and filed it against the said Tallassee Falls Manufacturing Company alone, alleging that it was the owner of said property. That being informed afterwards that the Tallassee Falls Manufacturing Company had conveyed said property to your petitioner, the Mount Vernon-Woodberry Cotton Duck Company, said plaintiff dismissed its first petition and filed its second petition copied in Exhibit "A" hereto. That during the pendency of said first petition said Probate Court assumed jurisdiction of the same by allowing an amendment to be filed to said petition. That it has assumed jurisdiction of said second petition, Exhibit "A" by issuing process requiring your petitioners to answer said petition by the 24th day of June, 1912, and has set said
7 petition down for hearing on said 24th day of June, 1912.

Petitioners allege that if they appear in said Probate Court, and object to the exercise of jurisdiction by said Court and said objection should be overruled, said Probate Court would forthwith proceed to hear and determine said petition and if no further defense were made thereto than the filing of said objection to the jurisdiction, would, if it overruled the same, proceed at once to render a judgment adjudging and decreeing the said petitioners to be entitled to the relief prayed in said petition and appointing commissioners to assess the value of the property sought to be condemned. That your petitioners would not have sufficient time between the ruling of said court on said objection and its rendition of a judgment in favor of the plaintiff, in which to apply for a writ of prohibition. And petitioners aver that the act of said court in assuming jurisdiction to allow an amendment to the first petition filed in it as aforesaid shows

that it would assume jurisdiction (as petitioners allege it would in fact do) to hear and determine said petition.

And petitioners therefore state that if they should wait until said hearing for the purpose of objecting to the jurisdiction of said Probate Court they would be deprived of the right to invoke the jurisdiction of this Honorable Court for the purpose of prohibiting the exercise of jurisdiction by said Probate Court.

The premises considered your petitioners jointly and severally pray that an alternative writ or a rule nisi be granted by your Honor, the Judge of said Circuit Court of Tallapoosa County or by some other Judge having jurisdiction to grant the same, returnable into said Circuit Court, commanding the said Probate Court and the Judge thereof, namely, Hon. G. J. Sorrell to refrain and desist from hearing or determining said petition or any part thereof and from making any further orders in the proceeding instituted by the filing of said petition, or that said Court through the Judge thereof show cause in said Circuit Court why it does not so refrain and desist.

On final hearing petitioners pray that this Honorable Court will make said rule absolute and will issue a writ of prohibition, perpetually prohibiting the said Probate Court of Tallapoosa County from the exercise of jurisdiction in respect to any of said matters, and prohibiting said Alabama Interstate Power Co. from seeking to condemn said property.

And if mistaken in the special relief prayed, your petitioners pray for such other and further or different relief as the nature of
8 the circumstances of their case shall require. And petitioners will ever pray, etc.

H. N. RANDOLPH,
J. M. CHILTON,
Attorneys for Petitioners.

GUGGENHEIMER, UNTERMYER & MARSHALL,
Of Counsel.

STATE OF ALABAMA,
County of Montgomery:

Before me, J. A. Ledbetter, a Notary Public in and for said State and County this day appeared W. E. Elsberry, who being duly sworn states on oath that the statements made in the foregoing petition purporting to be statements of fact, are true as therein named. Further that he is the Secretary and Assistant Treasurer of the Tallassee Falls Manufacturing Company and is the only officer of said Company, in the State of Alabama. That he is also, for the purpose of making this affidavit, the agent of the Mount Vernon-Woodberry Cotton Duck Company, of the International Trust Company of Maryland and of the Continental Trust Company.

W. E. ELSBERRY.

Sworn to and subscribed before me this the 20th day of June, 1912.
[SEAL.]
J. A. LEDBETTER,
Notary Public.

Petition of Alabama Interstate Power Co., Attached to Petition.

STATE OF ALABAMA,
Tallapoosa County:

To the Honorable Probate Court of said County:

Your petitioner, Alabama Interstate Power Company, shows unto the honorable court as follows:

1. That your petitioner, Alabama Interstate Power Company, is a corporation organized and existing under the laws of the State of Maine, with its residence and principal place of business in the said State of Maine, and that it has complied with all of the provisions of the Constitution and laws of the State of Alabama required to be performed by foreign corporations in order to do business within the State of Alabama; that the defendant, Tallassee Falls Manu-
9 facturing Company is a corporation organized and existing under the laws of the State of Alabama; that the defendant Consolidated Cotton Duck Company is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Baltimore, Maryland; that the defendants Sigmund M. Lehman and Philip Lehman reside in the City, County, and State of New York, and are made parties defendant herein as trustees under the instrument hereinafter referred to of May 1, 1899; that the Defendant Mt. Vernon-Woodberry Cotton Duck Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the city of Baltimore, Maryland; that the defendant Continental Trust Company is a corporation organized and existing under the laws of the State of Maryland, having its principal place of business in the City of Baltimore, in said State, and is herein made a defendant as trustee under the instrument executed to it by said Mt. Vernon-Woodberry Cotton Duck Company of Aug. 30, 1899, and as trustee under the instrument executed on Feb'y 8, 1900, by and between Tallassee Falls Manufacturing Company and others, both of which instruments are hereinafter referred to; that the defendant International Trust Company is a corporation organized and existing under the laws of the State of Maryland, having its principal place of business in the city of Baltimore, in said State, and is herein made a defendant as trustee under the instrument to it by said Mt. Vernon-Woodberry Cotton Duck Company of Aug. 30, 1899, and as trustee under the instrument executed on Feb. 8, 1900, by and between Tallassee Falls Manufacturing Company and others, both of which instruments are hereinafter referred to.

2. Your petitioner further avers that so, to-wit, May 1, 1899, said Tallassee Falls Manufacturing Company did execute unto said Sigmund M. Lehman and Philip Lehman a deed of trust or mortgage, in and by which said Tallassee Falls Manufacturing Company did convey the property described in this application unto said Sigmund M. Lehman and Philip Lehman and the survivors of them, and their successors in trust, for the uses and purposes set forth and de-

clared in said instrument, to-wit, the benefit and security of the holders of bonds amounting to $250,000 secured thereby; which said instrument was filed for record and recorded in Mortgage Record 103, page 1 et seq., in the probate office of Tallapoosa County, Alabama.

3. And your petitioner further avers that on, to-wit, Feb. 8, 1900, said Tallassee Falls Manufacturing Company did enter into an agreement with said Mt. Vernon-Woodberry Cotton Duck Company, said Continental Trust Company, Trustee, and said International Trust Company, Trustee, in and by which said instrument said Tallassee Falls Manufacturing Company did convey unto the said Mt. Vernon-Woodberry Cotton Duck Company the property described in this application at the request of said Mt. Vernon-Woodberry Cotton Duck Company, to the end of subjecting said property to the liens and covenants of a mortgage executed by said Mt. Vernon-Woodberry Cotton Duck Company, of date Aug. 30, 1899, to said Continental Trust Company, Trustee, securing an issue of first mortgage five per cent fifty year gold bonds, amountin-in the aggregate to $8,000,000 in said mortgage particularly described: that in and by said instrument said Tallassee Falls Manufacturing Company did also convey unto said Mt. Vernon-Woodberry Cotton Duck Company the property described in this application, at the request of said Mt. Vernon-Woodberry Cotton Duck Company, to the end of subjecting said property to the liens and covenants of a mortgage executed by said Mt. Vernon-Woodberry Duck Company, of date Aug. 30, 1899, to said International Trust Company, Trustee, securing an issue of first income mortgage five per cent gold bonds amounting to the aggregate to $6,000,000, in said mortgage particularly described; and said Tallassee Falls Manufacturing — did in and by said instrument of Feb. 8, 1900, also convey the properties described in this application to said Continental Trust Company, Trustee, and said International Trust Company, Trustee, and their successors in said trusts, for the uses and purposes and upon the trusts set forth in said respective mortgages; which said instrument of Feb. 8, 1900, was filed for record in the Probate Office of Tallapoosa County, Alabama, on May 15, 1900, and Recorded in Deed Record 9, page 16, et seq.; and your petitioner further avers that the said respective instruments of May 1, 1899, Aug. 30, 1899, and Feb. 8, 1900, are still outstanding and unsatisfied.

4. Your petitioner by its charter has the right to manufacture, supply, and sell to the public power produced by water as a motive force, and is also vested with all other powers, privileges, franchises, and immunities which are or may be required to carry such charter right into effect, including the right to construct and complete a dam or dams, power house or power houses, and works necessary incident, and related thereto, and to dam or store water, and to divert or otherwise use water, in the construction of its plants and the operation of its business and to do all other acts, and things which may be necessary or advantageous in the construction of its plants or works and in the operation of its business:

5. That your petitioner has acquired by purchase a dam or power

site within the State of Alabama, comprising not less than
11 one acre of land upon each and opposite sides of the Tallapoosa River, in Section 36, Township 20, Range 21, the east abutment site of which is in Tallapoosa County, and the west abutment site of which is in Elmore County, in said State of Alabama; that said Tallapoosa River is a non-navigable water course in the State of Alabama; that your petitioner is now engaged in constructing and proposes to operate at said site and across the said Tallapoosa River a dam for the manufacture and supply of power produced by water as a motive force for the public, and is preparing to impound the water of the said Tallapoosa River at said point:

6. Your petitioner further avers that the defendants Tallassee Falls Manufacturing Company and Mt. Vernon-Woodberry Cotton Duck Company and Consolidated Cotton Duck Company own and operate two cotton factories in the northeast quarter of Section 19, Township 18, North Range 22, East, in Tallapoosa and Elmore Counties, Alabama, one of which factories is located on that part of the northeast quarter of said section 19 lying east of the said Tallapoosa River, in Tallapoosa County, Alabama, and the other of said factories is located on that part of the northeast quarter of said Section 19 lying west of said Tallapoosa River, in Elmore County, Alabama; that in connection with said cotton factories, said defendants heretofore erected a dam across said Tallapoosa River, in said northeast quarter of said Section 19, together with hydraulic structures, by means of which they generate a limited amount of power produced by water from said River, greatly less than the capacity of said River, and thereby operate said cotton factories; that by reason of the erection of petitioner's said dam upon and across said Tallapoosa River in said Section 36, Township 20, Range 21, the flow of the water of the said Tallapoosa River will be greatly increased at certain seasons of the year, resulting in the erection of water power largely in excess of what is now in actual use by the defendants, or may be used by them at normal stages of the Tallapoosa River, in the *operate* of said cotton factories, as established at the time this condemnation proceeding is commenced; that your petitioner desires and now seeks to acquire the following described lands, water, and water rights of the defendants in excess of what is actually in use by them or may be used by them at normal stages of the said Tallapoosa River in the operation of said cotton factories as established at the time this proceeding is commenced, to-wit.

(*a*) For a power house or location for additional structures for the accommodation of turbines, water wheels, and other hy-
12 draulics and electric machinery, that certain lot or parcel of land in said Section Nineteen, Township Eighteen North, Range Twenty-two East, in Tallapoosa County, Alabama, more particularly described and designated by red lines on the sketch hereto attached and made a part of this petition, marked Exhibit "A," to-wit: Beginning at Point A on said sketch, which point is located on the southern side of said dam of *them* defendant a distance of one hundred forty feet in a westerly direction along said dam from the western end of the easterly spillway at the dam; thence

from said Point A a distance of five hundred thirty feet to Point B on said sketch, which Point B is on a line joining Point A and the center of that certain pier of the highway bridge across said Tallapoosa River immediately south of the dam of the defendants and marked Pier No. 4 on said sketch; thence from said Point B in a westerly direction one hundred eighty feet to Point C on said sketch; thence in a northwesterly direction five hundred fifty feet from said Point C to Point D, located on the southern side of said dam and at the east end of the westerly spillway of said dam; thence from said Point D along the southern side of said dam to A, the point of beginning; containing in all 37 acres more or less together with the right to construct an opening in the middle section of said dam of the defendants of the width of two hundred feet, for the purpose of causing the said excess of water to pass along and through the power house and hydraulic machinery of the petitioner:

(*b*) Also the right to excavate and improve the present bed of said Tallapoosa River, to provide a tail race below said lot or parcel of land in the bed of the said river, two hundred feet in width, and running down said River not exceeding one thousand feet below said dam of the defendant:

(*c*) Also the water flowing down said Tallapoosa River at and over said dam of the defendants, and the right to use the same in the generation of electricity for sale to the public in excess of what is actually in use by said defendants or may be used by them, at normal stages of the stream, with their hydraulic structures as established at the time this condemnation proceeding is commenced:

7. Your petitioner further shows that the defendants own or control a spur railroad track running from the depot of the Tallassee & Montgomery Railroad Company at or near the town of Tallassee, in Elmore County, Alabama, to each of the cotton factories hereinabove described, and your petitioner also seeks to condemn and to acquire a right to use the said railroad tracks of the defendants on the west bank of said river, in the transportation of freight and ma-
13 terial that may be needed by petitioner in the construction of its said hydraulic works and your petitioner also seeks to condemn and to acquire the right to construct from the said railroad tracks on the western bank of said river a continuation of said railroad tracks over and upon the Tallapoosa River and over and upon the lands of the defendants to the lands of the said defendants in said river sought herein to be condemned, to the end that petitioner may transport such material, equipment and supplies required or useful in the construction, operation, and maintenance of such works of petitioner; and your petitioner further seeks hereby to condemn and to acquire a right of way not exceeding one hundred feet in width over the roadway and lands of the defendant leading from said depot of said Tallassee & Montgomery Railroad Company, in said town of Tallassee, to the said cotton factory of the defendants on the western bank of said River, and from that point petitioner seeks hereby to condemn and to acquire the right to build on and over the lands of the defendant a bridge or other approach to the lands which petitioner seeks hereby to condemn and to acquire, all for the purpose of constructing earth and steam roads for the trans-

portation of material, equipment, and supplies required or useful in the construction and operation and maintenance of said works of petitioner, and to use the same hereafter as a right of way for ingress and egress from its said power house and works by its employees and for the erection and operation on, over, along, and across the same of towers and poles and the stringing thereon of electric wires.

8. And your petitioner further avers that it seeks to acquire the lands, easements, hydraulic structures, water, and water rights described in this application, to be used by it in the manufacture, supply and sale to the public of power produced by water as a motive force, the better to enable it to perform its duty to the public as a public service corporation; and your petitioner does now expressly recognize the duty and obligation to the public imposed upon it by the laws of Alabama to manufacture supply, and sell to the public electric current which will be produced by it by means of the use of the properties sought herein to be acquired by it, as well as by means of the use of the properties already owned by it, as described in paragraph five of this petition.

"Premises considered, your petitioner makes the said Tallassee Falls Manufacturing Company, Consolidated Cotton Duck Company, Sigmund M. Lehman, Philip Lehman, Trustee, Mt. Vernon-Woodberry Cotton Duck Company, Continental Trust Company, Trustee, and International Trust Company,
14 Trustee, parties defendant to this application as hereinabove set forth, and prays that an order may be made appointing a day for the hearing thereof; that notice of this application and of the day so appointed for the hearing thereof be issued to and served upon the defendant Tallassee Falls Manufacturing Company in the manner required by law, at least ten days before the day appointed for such hearing; and that notice of this application be given to the defendants Consolidated Cotton Duck Company, Sigmund M. Lehman and Philip Lehman Trustees, Mt. Vernon-Woodberry Cotton Duck Company, Continental Trust Company, Trustee, and International Trust Company, Trustee, by advertisement in some newspaper published in said County of Tallapoosa for at least three weeks before the day so appointed for such hearing; and that upon such hearing, an order may be made by the court granting this application; that all such other orders and decrees may be made and entered as may be proper under the statutes in such cases made and provided, and the rules of this honorable court, to the end that your petitioner may acquire the land, covenants, hydraulic structures, water, and water rights hereinabove described; and if petitioner is mistaken in the special relief herein prayed for, it prays for all such other, further, and more general relief, to the end aforesaid, as may be authorized by law. ALABAMA INTERSTATE POWER COMPANY,

By THOS. W. MARTIN, *Its Agent and Attorney.*

G. A. SORRELL,
J. W. STROTHER,
RAY RUSHTON,
TYSON, WILSON & MARTIN,
Attorneys for Petitioner.

STATE OF ALABAMA,
Montgomery County:

Before the undersigned authority personally appeared Thos. J. Martin, who being by me first duly sworn on oath deposes and that he is one of the attorneys for the Alabama Interstate P[illegible] Company in the foregoing cause, and is the duly authorized a[gent] of the said Company in the State of Alabama, and has authority make this affidavit for and on behalf of said Alabama Interstate Power Company, and that the statements contained in the foregoing application are true and correct as therein alleged.

THOS. W. MARTIN.

15 Sworn to and subscribed before me, this the 25th day of May, 1912.

BERNICE SUMMERS,
Notary Public, Montgomery County, Alabama.

We hereby jointly and severally acknowledge ourselves as security for all of the costs of the foregoing proceeding.
This the 25th day of May, 1912.

ALABAMA INTERSTATE POWER COMPANY.
By THOS. W. MARTIN, *Its Agent and Attorney.*
THOS. W. MARTIN.
JNO. R. TYSON.

Approved this the 25th day of May, 1912.

G. J. SORRELL,
Judge of Probate.

(Here follows sketch marked page 16.)

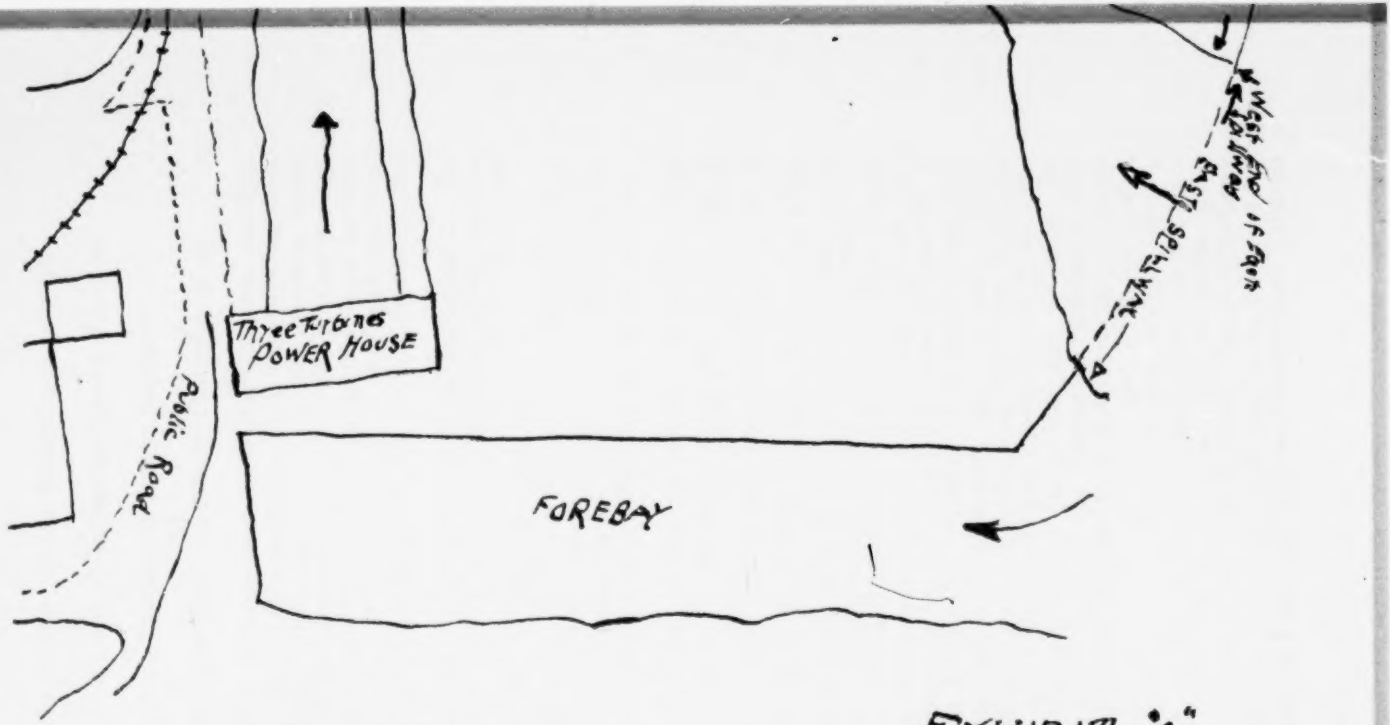
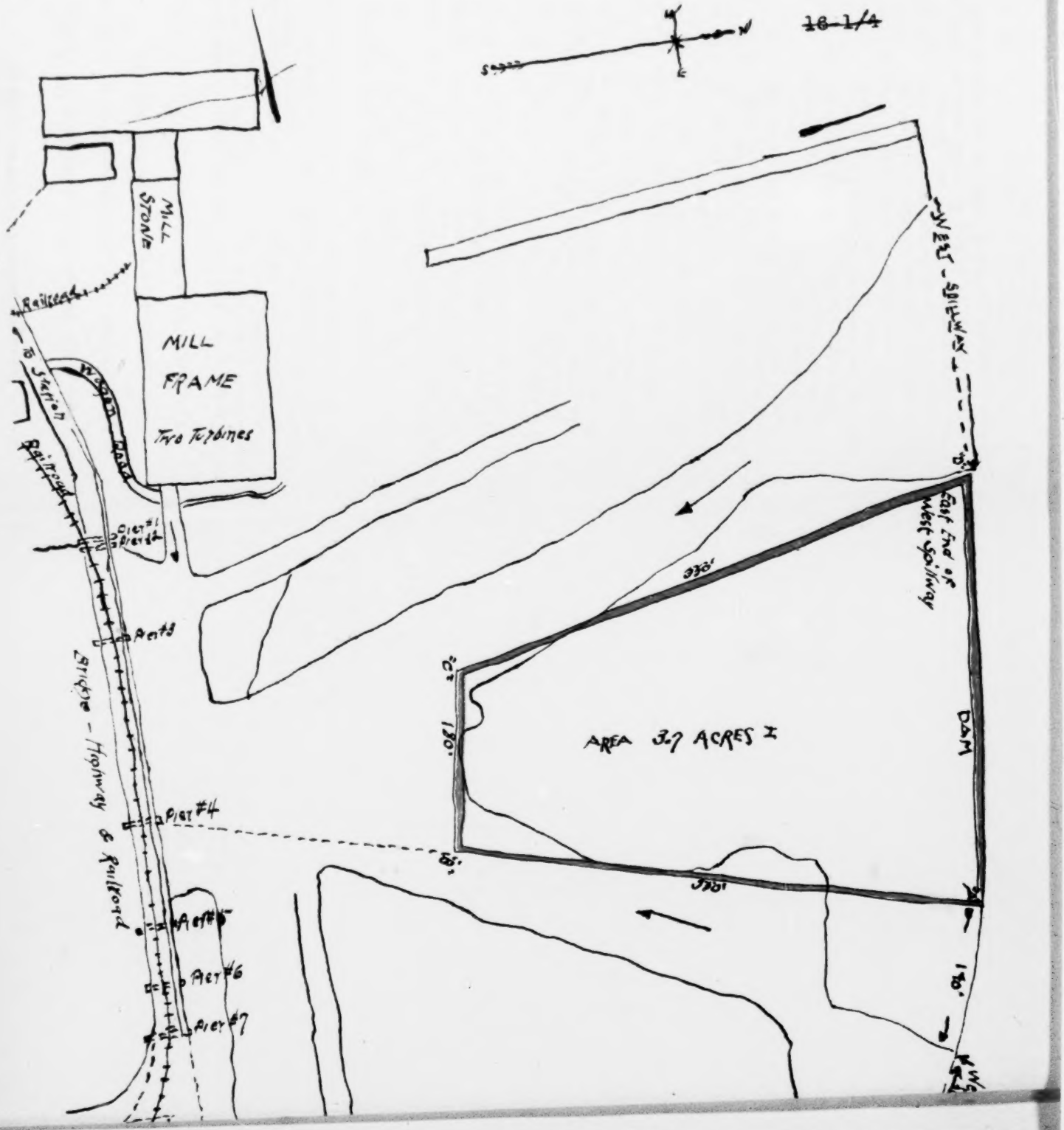


EXHIBIT "A"

Mt. Vernon Co
v.
Ala. Interstate Power Co } p. 16


16-1/4
MILL
STONE
MILL
FRAME
Two Turbines
Railroad
To Station
Pier #1
Pier #2
Pier #3
Pier #4
Pier #5
Pier #6
Pier #7
Bridge - Highway & Railroad
WEST SPILLWAY
East End of West Spillway
930'
AREA 3.7 ACRES ±
DAM
180'
330'
180'
N.W.

17 *Order of the Probate Court Attached to the Petition.*

In the Probate Court of Tallapoosa County, Alabama.

ALABAMA INTERSTATE POWER COMPANY
v.
TALLASSEE FALLS MANUFACTURING COMPANY et al.

On this day comes Alabama Interstate Power Company, and filed its application in writing, duly verified by oath, seeking to condemn and to acquire certain lands, easements, hydraulic structures, water and water rights of said defendants named in said application, and it appearing to the Court that the said application complies with the statutes of the State of Alabama in such cases made and provided, and that petitioner is entitled to file such application in this Court:

It is now therefore considered, ordered and adjudged by the court that this court has and does take jurisdiction of said application and the 24 day of June, 1912, at eleven o'clock A. M. be and is appointed as the time for the hearing thereof:

It is further ordered by the Court that a copy of this order and a copy of said application be issued to the defendant, Tallassee Falls Manufacturing Company and served upon it by a Sheriff of the State of Alabama at least ten days before the day set for such hearing:

It is further considered, ordered and adjudged by the Court that notice of said application of the day so appointed for the hearing thereof be given to the defendants Sigmund M. Lehman and Philip Lehman, who reside in the City, County and State of New York, as trustees under the mortgage of May 1, 1899, referred to in said application, and to the defendant, Consolidated Cotton Duck Company, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Baltimore, Maryland, and to the defendant Mt. Vernon-Woodberry Cotton Duck Company, a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in Baltimore, Maryland, and to the defendant, Continental Trust Company, a corporation organized and existing under the laws of Maryland, having its principal place of business in Baltimore, Maryland,

18 as trustee under the instrument executed to it by said Mt. Vernon-Woodberry Cotton Duck Company, on Aug. 30, 1899, and as trustee under the instrument executed on Feb. 8, 1900, by and between Tallassee Falls Manufacturing Company and others, referred to in said application, and to the defendant, International Trust Company, a corporation organized and existing under the laws of the State of Maryland, having its principal place of business in the City of Baltimore, in said State, as trustee under the instrument executed to it by said Mount Vernon-Woodberry Cotton Duck Company, of Aug. 30, 1899, and as trustee under the instrument executed on Feb. 8, 1900, by and between said Tallassee

Falls Manufacturing Company and others referred to in said application, by advertisements in Spot Cash, a newspaper published in Tallapoosa County, Alabama, once a week for three successive weeks before the day appointed for such hearing.

Done in Open Court, this the 25th day of May, 1912.

G. J. SORRELL,
Judge of Probate.

Filed in office June 22nd, 1912—at 6:30 P. M.

N. S. WALKER, *Clerk,*
By WM. C. ROECK,
Deputy Clerk.

Bond.

STATE OF ALABAMA,
Montgomery County:

Know all men by these presents, that we, the Tallassee Falls Manufacturing Company, a corporation and the American Bonding Company of Baltimore, are held and firmly bound unto the Alabama Interstate Power Company in the sum of Two Thousand Dollars, for the payment of which, well and truly to be made we bind ourselves and each of us and our and each of our successors, jointly and severally, firmly by these presents.

Sealed and dated this, the 21st day of June, 1912.

The condition of the above obligation is such, that whereas on the date hereof said Tallassee Falls Manufacturing Company and others have presented to Hon. S. L. Brewer, Judge of Fifth Judicial Circuit of Alabama, their petition under oath for an alternative writ of prohibition or rule nisi restraining and prohibiting the Probate Court of Tallapoosa County, from hearing or determining a certain proceeding for condemnation filed in said Probate Court by said Alabama Interstate Power Company and to prohibit said last named corporation from prosecuting said proceeding.

And whereas Hon. S. L. Brewer as Judge of the Fifth
19 Judicial Circuit of Alabama granted said alternative writ or rule nisi but has required that one or more of said petitioners shall execute bond with surety in said sum of $2,000.00 with the condition hereinafter stated as will appear from his order of even date herewith.

Now, the condition of this obligation is such that if said Tallassee Falls Manufacturing Company and said other petitioners shall fail to prosecute said prohibition proceeding to effect and shall thereupon pay to said Alabama Interstate Power Company all such costs and damages as it may sustain by said proceeding, including the court costs, then this bond to be void; otherwise to remain in full force and effect.

TALLASSEE FALLS MFG. CO.,
p. W. E. ELSBERRY, *Sec'y & Tr.*
AMERICAN BONDING COMPANY
OF BALTIMORE,
By GEO. A. THOMAS,
Its Attorney in Fact.

Approved this June 21st, 1912.
S. L. BREWER,
Judge Fifth Judicial Circuit.

Filed in Office, June 22nd, 1912,—at 6:30 P. M.
N. S. WALKER, *Clerk,*
By WM. C. ROECK,
Deputy Clerk.

Rule Nisi.

The Mount Vernon-Woodberry Cotton Duck Company, the Continental Trust Company, the Tallassee Falls Manufacturing Company and the International Trust Company of Maryland and the Consolidated Cotton Duck Co., having this day presented to the undersigned as Judge of the Fifth Judicial Circuit of the State of Alabama, their petition under oath addressed to the Circuit Court of Tallapoosa County and to the Judge of said Court praying that a writ of prohibition issue to the Probate Court of Tallapoosa County and to the Judge thereof, namely, Hon. G. J. Sorrell restraining and prohibiting said Probate Court and the Judge thereof from hearing and determining certain proceedings instituted in said Probate Court by the Alabama Interstate Power Company in which it seeks to condemn a certain portion of the dam across the Tallapoosa River at Tallassee, Alabama owned by said Mount Vernon-Woodberry Cotton Duck Company and in which it seeks to condemn other property or property rights at Tallassee belonging to said last named corporation—all which appears from a copy of said proceedings in said Probate Court which is attached to said petition now presented to me; and said petition being now presented for the alternative writ or rule nisi prayed therein:

Upon consideration, it is ordered and adjudged that an alternative writ or rule nisi be and is hereby granted as prayed in said petition, and that said Probate Court of Tallapoosa County and the Judge thereof are commanded to desist and refrain from and are hereby prohibited from hearing or determining the said petition of said Alabama Interstate Power Company and from making any further orders in the proceedings so instituted by the filing of said petition, and said last named corporation from prosecuting the same, or that said Court through the Judge thereof show cause in said Circuit Court of Tallapoosa County, to-wit, at the next term thereof why it does not so refrain and desist.

It is further ordered and adjudged that as the granting of said alternative writ or rule nisi, operates a suspension of all further proceeding in said Probate Court until the further order of said Circuit Court, and a suspension of the right of said Alabama Interstate Power Company to further prosecute said proceedings that one or more of said petitioners make bond with security in the sum of Two Thousand Dollars payable to the Alabama Interstate Power Company and conditioned that said petitioners will prosecute said pro-

hibition proceeding to effect, or that failing therein they will pay all such costs and damages as said Alabama Interstate Power Company may sustain from said proceedings including the court costs in said proceeding.

And said bond having been executed by the Tallassee Falls Manufacturing company in the amount, and conditioned and payable as hereinabove provided and with sufficient surety, it is further ordered and adjudged that said bond be and the same is hereby approved.

It is further ordered and adjudged that said petition for prohibition and this order thereon and said bond be filed in said Circuit Court of Tallapoosa County and that the Clerk of said Court forthwith issue and cause to be served upon Hon. G. J. Sorrell, the Judge of said Probate Court and upon the Alabama Interstate Power Company by service upon the agent which it has caused to be appointed in the State of Alabama under the Foreign Corporation laws of this State, of a copy of this order. Dated this 21st day of June, 1912.

S. L. BREWER,
Judge Fifth Judicial Circuit.

21 To Any Sheriff of the State of Alabama:

You are hereby commanded to execute the foregoing order by serving a copy of same upon Hon. G. J. Sorrell as Judge of Probate Court of Tallapoosa County, Alabama, and upon the Alabama Interstate Power Co., by serving a copy upon its agent appointed under foreign corporation laws of Alabama.

This 22nd day of June, 1912.

N. S. WALKER,
Clerk of Circuit Court,
By WM. C. ROECK,
Deputy.

Executed by giving a copy of the within summons *on* Thos. W. Martin as Agent and Att'y for Alabama Interstate Power Company.

This 15th July, 1912.

HORACE HOOD, *Sh'ff,*
Per H. C. SADLER, *D. S.*

Filed in office June 22nd, 1912, at 6:30 P. M.

N. S. WALKER, *Clerk,*
By WM. C. ROECK.
Deputy Clerk.

Rule Nisi.

The Mount Vernon-Woodberry Cotton Duck Company, the Continental Trust Company, the Tallassee Falls Manufacturing Company and the International Trust Company of Maryland and the Consolidated Cotton Duck Co. having this day presented to the undersigned as Judge of the Fifth Judicial Circuit of the State of Alabama, their petition under oath addressed to the Circuit Court

of Tallapoosa County and to the Judge of said Court praying that a writ of prohibition issue to the Probate Court of Tallapoosa County and to the Judge thereof, namely, Hon. G. J. Sorrell restraining and prohibiting said Probate Court and the Judge thereof from hearing and determining certain proceedings instituted in said Probate Court by the Alabama Interstate Power Company in which it seeks to condemn a certain portion of the dam across the Tallapoosa River at Tallassee, Alabama, owned by said Mount Vernon-Woodberry Cotton Duck Company and in which it seeks to condemn other property or property rights at Tallassee belonging to said last named corporation—all which appears from a copy of said proceedings in said Probate Court which is attached to said petition now presented to me; and said petition being now presented for the alternative writ or rule nisi prayed therein;

22 Upon consideration, it is ordered and adjudged that an alternative writ or rule nisi be and is hereby granted as prayed in said petition, and that said Probate Court of Tallapoosa County and the judge thereof are commanded to desist and refrain from and are hereby prohibited from hearing or determining the said petition of said Alabama Interstate Power Company and from making any further orders in the proceeding so instituted by the filing of said petition, and said last named corporation from prosecuting the said, or that said Court through the Judge thereof may show cause in said Circuit Court of Tallapoosa County, to-wit, at the next term thereof why it does not so refrain and desist.

It is further ordered and adjudged that as the granting of said alternative writ or rule nisi, operates a suspension of all further proceeding in said Probate Court until the further order of said Circuit Court and a suspension of the right of said Alabama Interstate Power Company to further prosecute said proceeding that one or more of said petitioners make bond with security in the sum of Two Thousand dollars payable to the Alabama Interstate Power Company and conditioned that said petitioners will prosecute said proceeding to effect, or that failing therein they will pay all such costs and damages as said Alabama Interstate Power Company may sustain from said Proceedings, including the court costs in said proceeding.

And said bond having been executed by the Tallassee Falls Manufacturing Company in the amount, and conditioned and payable as hereinabove provided and with sufficient serety, it is further ordered and adjudged that said bond be and the same is hereby approved.

It is further ordered and adjudged that said petition for prohibition and this order thereon and said bond be filed in said Circuit Court of Tallapoosa County and that the Clerk of said Court forthwith issue and cause to be served upon Hon. G. J. Sorrell, the Judge of said Probate Court and upon the Alabama Interstate Power Company by service upon the agent which it has caused to be appointed in the State of Alabama under the Foreign Corporation laws of this State, of a copy of this order.

Dated this 21st day of June, 1912.

S. L. BREWER,
Judge Fifth Judicial Circuit.

Executed the within "Rule Nisi" by serving a copy of the same on Hon. G. J. Sorrell, Judge of Probate, and a copy of the same
23 on Hon. Jas. W. Strother, Att'y for Def'ts, in person.
This 22nd day of June, 1912.

J. H. LINCH, *Sheriff.*

Filed in office June 22nd, 1912, at 6:30 P. M.
N. S. WALKER, *Clerk,*
By WM. C. ROECK, *Deputy Clerk.*

Security for Costs of Appeal.

In the Circuit Court of Tallapoosa County.

MT. VERNON-WOODBERRY COTTON DUCK CO.
vs.
G. J. SORRELL, Probate Judge, etc., et al.

We, G. J. Sorrell, individually and as Judge of the Probate Court of Tallapoosa County, Alabama, and Alabama Interstate Power Company, a corporation, as principals, desiring to appeal to the Supreme Court of Alabama from the order of Hon. S. L. Brewer, Judge of the fifth Judicial Circuit, made on the 21st day of June, 1912, granting the alternative writ or rule nisi on the petition of the plaintiffs in the above styled cause, do hereby, together with Alabama Fidelity & Casualty Company, as surety, acknowledge ourselves as security for all of the cost of said appeal.

This the 24th day of June, 1912.

G. J. SORRELL.
G. J. SORRELL,
As Judge of the Probate Court of Tallapoosa County, Ala.
ALABAMA INTERSTATE POWER CO.,
By G. A. SORRELL,
J. W. STROTHER,
RAY RUSHTON, AND
TYSON, WILSON & MARTIN,
As Its Attorneys of Record.
[SEAL.] ALABAMA FIDELITY & CASUALTY CO.,
By THOS. W. MARTIN,
As Its Attorney in Fact.

Taken and approved, this June 25th, 1912.
S. L. BREWER,
Judge Fifth Judicial Circuit, State of Alabama.

24 Filed in office this June 26th, 1912.
N. S. WALKER,
Clerk Circuit Court, Tallapoosa Co.

Request and Application of Defendants to Fix Amount of Supersedeas Bond, and Order Thereon.

In the Circuit Court of Tallapoosa County.

MT. VERNON-WOODBERRY COTTON DUCK COMPANY.
vs.
G. J. SORRELL, Probate Judge, etc., et al.

To the Honorable S. L. Brewer, Judge of the Fifth Judicial Circuit of Alabama:

G. J. Sorrell, individually and as Judge of the Probate Court of Tallapoosa County, Alabama, and Alabama Interstate Power Company, the Defendants in the above entitled cause, do hereby apply to you and request you to fix the amount of the Supersedeas bond to be given by them pursuant to section 2843 of the Code of Alabama to the end that the alternative writ or rule nisi heretofore made by you may be suspended pending the appeal taken by them from your judgment granting such writ.

This 24th day of June, 1912.

G. J. SORRELL.
G. J. SORRELL,
As Judge of the Probate Court of Tallapoosa County, Ala.
ALABAMA INTERSTATE POWER CO.,
By G. A. SORRELL.
J. W. STROTHER.
RAY RUSHTON, AND
TYSON, WILSON & MARTIN,
Its Attorneys of Record.

Order.

Order Fixing Amount of Bond.

The foregoing application coming on to be heard, it is now considered and ordered that upon the execution of a bond by the appellants in said cause in the sum of $2,000.00, payable and conditioned as required by Section 2843 of the Code of Alabama, such appeal shall operate as a supersedeas of the Judgment referred to in said application.

This the 25th day of June, 1912.

S. L. BREWER,
Judge Fifth Judicial Circuit of Alabama.

Filed in office this June 26th, 1912.

N. S. WALKER,
Clerk of Circuit Court, Tallapoosa County.

Supersedeas Bond.

Know all men by these presents, That we, G. J. Sorrell, individually and as Judge of the Probate Court of Tallapoosa County, Alabama, and Alabama Interstate Power Company, a corporation, as principals, and Alabama Fidelity & Casualty Company, as surety, are held and firmly bound unto Mt. Vernon-Woodberry Cotton Duck Company, Continental Trust Company, Tallassee Falls Manufacturing Company, International Trust Company of Maryland, and Consolidated Cotton Duck Company, in the penal sum of Two Thousand & no/100 Dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, successors and assigns.

Sealed with our seals and dated, this the 24th day of June, 1912.

The condition of the above obligation is such that whereas, on the 21st day of June, 1912, the Hon. S. L. Brewer, as Judge of the Fifth Judicial Circuit of the State of Alabama, did make or grant the alternative writ of rule nisi on the petition of said Mt. Vernon-Woodberry Cotton Duck Company, Tallassee Falls Manufacturing Company, Continental Trust Company, International Trust Company of Maryland and Consolidated Cotton Duck Company, prohibiting the said G. J. Sorrell, as Judge of the Probate Court of Tallapoosa County, Alabama, and the said Probate Court, from hearing or determining the petition of said Alabama Interstate Power Company, pending in said Probate Court, to Condemn certain property of said Mt. Vernon-Woodberry Cotton Duck Company et al., and in and by said order the said Alabama Interstate Power Company was also prohibited from prosecuting said petition.

And whereas, said G. J. Sorrell, individually and as Judge of the said Probate Court, and the said Alabama Interstate Power Company, have prayed for and obtained an appeal to the Supreme Court of Alabama from the judgment of the said S. L.
26 Brewer, as Judge of said Circuit Court, and have given security for the costs of appeal; and have also applied to the said S. L. Brewer, as Judge of said Circuit Court, to fix the amount of the bond to be given by the appellants for a supersedeas of said judgment, and the said judge has required a bond with sufficient surety to be given by such appellants, payable to the appellees, in the sum of $2,000.00, conditioned to pay all damages thereby sustained:

Now therefore, if the said G. J. Sorrell, individually and as Judge of said Probate Court of said County of Tallapoosa, and said Alabama Interstate Power Company, shall prosecute to effect the said appeal so taken by them, or failing therein shall pay all damages

thereby sustained, then this obligation to be null and void; otherwise to remain in full force and effect.

G. J. SORRELL.
G. J. SORRELL,
As Judge of the Probate Court of Tallapoosa County, Alabama.
ALABAMA INTERSTATE POWER COMPANY,
By J. W. STROTHER.
G. A. SORRELL,
RAY RUSHTON, AND
TYSON, WILSON AND MARTIN,
As Its Attorneys.
[SEAL.] ALABAMA FIDELITY & CASUALTY COMPANY,
By THOS. W. MARTIN,
As Its Attorney in Fact.

Taken and approved on this June 25th, 1912.
S. L. BREWER,
Judge Fifth Judicial Circuit of the State of Alabama.

Taken and approved, on this June 26th, 1912.
N. S. WALKER,
Clerk Circuit Court of Tallapoosa Co., Ala.

Filed in Office this June 26th, 1912.
N. S. WALKER,
Clerk Circuit Court.

27 *Citation.*

THE STATE OF ALABAMA,
Tallapoosa County:

Circuit Court.

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY et al.
vs.
G. J. SORRELL, Probate Judge, etc., et al.

To Mount Vernon-Woodberry Cotton Duck Company, Continental Trust Company, Tallassee Falls Manufacturing Company, International Trust Company of Maryland, and Consolidated Cotton Duck Company, or J. M. Chilton, their attorney of record, Greeting:

Whereas, G. J. Sorrell, individually and as Judge of the Probate Court of Tallapoosa County, Alabama, and Alabama Interstate Power Company have taken an appeal to the Supreme Court of Alabama from the order of Honorable S. L. Brewer, Judge of the

Fifth Judicial Circuit of Alabama, made on the 21st day of June, 1912, granting the alternative writ or rule nisi on the petition of the plaintiff in the above styled cause of Mount Vernon-Woodberry Cotton Duck Company, et al. vs. G. J. Sorrell, Probate Judge, etc., et al.

Now, you are, therefore, cited to appear at the next term of the Supreme Court of Alabama, to defend on said appeal, if you shall think proper so to do.

Witness, this 26th day of June, 1912.

N. S. WALKER,
Clerk Circuit Court.

Service accepted for Appellees. June 27th, 1912.
J. M. CHILTON,
Att'y for Appellees.

Filed this 29th day of June, 1912.

N. S. WALKER,
Clerk Circuit Court.

Certificate.

Circuit Court, —— Term, 1912.

No. 977.

THE STATE OF ALABAMA,
Tallapoosa County:

I, N. S. Walker, Clerk of the Circuit Court of said County, hereby certify that the foregoing pages, from one to twenty-seven, contain a full and complete transcript of the record and proceedings of the Circuit Court of Tallapoosa County in a cause therein
28 pending, wherein Mount-Vernon-Woodberry Cotton Duck Company, et al., are plaintiffs, and Alabama Interstate Power Company and G. J. Sorrell, individually and as Judge of the Probate Court of Tallapoosa County, Alabama, are defendants; that the said Alabama Interstate Power Company and G. J. Sorrell, individually and as Judge of the Probate Court of Tallapoosa County, Alabama, did, on, to-wit, the 28th day of June, 1912, after giving security for cost, obtain an appeal to the next Term, 1912, of the Supreme Court of Alabama, from the order or judgment of the Honorable S. L. Brewer, Judge of said Court, made, to-wit, June 21, 1912, granting the alternative writ or rule nisi on the petition of the plaintiffs in said cause; and that Alabama Fidelity & Casualty Company is the surety for said costs of such appeal; and I further certify that said appellants did on, to-wit, June 28, 1912, also apply for and obtain from the Honorable S. L. Brewer, the Judge of said Circuit Court, an order fixing the sum of $2,000.00 as the amount of the bond to be given by the appellants for a supersedeas of said judgment; which bond was also given by said appellants and duly approved, and that Alabama Fidelity & Casualty

Company is the surety on such supersedeas bond. All of which I hereby certify to said Supreme Court.

Witness my hand, this 12th day of September, 1912.

[SEAL.] N. S. EALKER, *Clerk.*

29 *Assignments of Error.*

Now come the appellants and jointly and severally say that there is manifest error in the acts and proceedings of the Court below, to their prejudice, as follows:

1. The circuit judges erred in granting the rule nisi of date June 21, 1912. (R. p. 21.)

2. The circuit judge erred in the judgment rendered by him in and by which he granted the alternative writ or rule nisi to the appellants on June 21, 1912 (R. p. 19-22).

3. The circuit judge erred in the judgment rendered by him on June 21, 1912, on the application of the appellees for the writ of prohibition. (R. p. 19-20-21-22.)

4. The alternative writ or rule nisi granted by the circuit judge on June 21, 1912, is erroneous, in that under the facts stated in the petition for said rule nisi no writ or rule can legally issue. (R. p. 19-20-21 & 22.)

GEO. A. SORRELL,
JAS. W. STROTHER,
RAY RUSHTON,
TYSON, WILSON & MARTIN,
Attorneys for Appellants.

30 In the Supreme Court of Alabama, November Term, 1912.

Fifth Division. No. 470.

ALABAMA INTERSTATE POWER COMPANY et al., Appellants,
v.
MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY et al., Appellees.

Now come the appellants in the above styled cause, and show unto the court that Hon. S. L. Brewer, the Judge of the Fifth Judicial Circuit of the State of Alabama, did on June 21, 1912, grant an order for a rule nisi on the petition of the appellees, in and by which the Probate Court of Tallapoosa County and the judge thereof, viz., the Hon. G. J. Sorrell, were restrained and prohibited from hearing and determining a certain condemnation proceeding theretofore instituted in said Probate Court by the Alabama Interstate Power Company seeking to condemn certain property and rights; and by the further terms of said order the said Alabama Interstate Power Company was also prohibited from prosecuting the said petition until the said court, through the judge thereof, should show cause in the said Circuit Court, at the next term thereof why it should not refrain and desist; that the said G. J. Sorrell, and that the said G. J.

Sorrell, as judge of the said court, and the said Alabama Interstate Power Company did each appeal to this court from the said order or judgment of said circuit judge, as is shown by the record now filed in this court.

In the event this court should hold that no appeal lies from such order or judgment of said circuit judge, then the appellants do now jointly and severally pray and move the court for a writ of mandamus addressed to the Hon. S. L. Brewer, judge of the fifth judicial circuit of the State of Alabama, requiring him to appear before this honorable court and show cause why he should not set aside the said order so made by him on June 21, 1912, as having been improvidently granted.

This Nov. 18, 1912.

GEO. A. SORRELL,
JAS. W. STROTHER,
RAY RUSHTON,
TYSON, WILSON & MARTIN,
Attorneys for Movants.

To J. M. Chilton, Esq., Attorney for Appellees.

31 Supreme Court of Alabama.

THURSDAY, November 21st, 1912.

The Court met pursuant to adjournment.
Present: All the Justices.

5 Div. 470.

INTERSTATE POWER COMPANY et al.
vs.
MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY et al.

Appeal from Tallapoosa Circuit Court.

Leave is granted to sever in the assignments of error, and to assign errors separately as to each other.

Come the parties by attorneys and argue and submit this cause on briefs for decision.

32 5 Div. 470.

ALABAMA INTERSTATE POWER COMPANY et al.
vs.
MOUNT VERNON-WOODBERRY COTTON DUCK CO. et al.

Appeal from Tallapoosa Circuit Court.

Come the parties by attorneys, and the record and matters therein assigned for errors being argued and submitted, and duly examined and understood by the Court, it is considered that in the record and

proceedings of the Circuit Court there is manifest error. It is therefore considered that the judgment or order of the Judge of said Circuit Court granting the alternative writ of prohibition in said cause is reversed and annulled, and this Court proceeding to render the judgment or order the Circuit Judge should have rendered, doth order and adjudge that the judgment or order granting the alternative writ of prohibition is vacated and annulled, and that the petition for same be and is dismissed at the cost of the petitioners, for which costs execution may issue. It is also considered that the appellees pay the costs of appeal of this Court and of the Circuit Court.

33 Dec. 4, 1913. May 14, 1914.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, November Term, 1913-'14.

5 Div. 470.

ALABAMA INTERSTATE POWER COMPANY
v.
MT. VERNON-WOODBERRY COTTON DUCK CO. et al.

Appeal from Tallapoosa Circuit Court.

5 Div. 472.

TALLASSEE FALLS MAN'F'G CO. et al.
v.
ALABAMA INTERSTATE POWER CO. et al.

Appeal from Tallapoosa Chancery Court.

3 Div. 23.

TALLASSEE FALLS MAN'F'G CO. et al.
v.
ALABAMA INTERSTATE POWER CO. et al.

Appeal from Montgomery City Court.

MCCLELLAN, *J.:*

These three appeals were joined on submission. Their single assignment followed. While there are questions peculiar to each, the subject matter giving rise to the several contests in common, in a large sense, to all of them. It is probable the decision
34 of some of the appeals might be had without, of necessity, considering fundamental questions that, to now determine, will promote the final adjudication of the matters of real controversy.

There are a number of questions made by the respective solicitors that can properly arise, or be presented, only in the proposed condemnation proceeding. To consider them at this time would be premature. Broadly stated, the chief meritorious questions presented now involve the inquiry of authorized power vel non to condemn certain properties or rights in the asserted effort of the condemnor to subject and appropriate them to public use. The proposing condemnor is the Alabama Interstate Power Company (hereinafter called the Power Company). It was incorporated under the laws of the State of Maine. Its powers as conferred by the charter set out in the record, are most ample for producing, supplying and distributing "to the public of light, heat, power, and any other thing to which electricity, or other form of energy, is now or may hereafter be applied." The generation of electricity by means of the water power artificially afforded by a non-navigable water course in this State is the chief, and manifestly authorized (by the charter) aim of the condemnor. Such main powers, together with all incidental powers, could not be conferred in broader, as well as more particular, terms than this charter *employes*. So far as charter-powers are concerned, there can be no doubt of the complete authorization of the Power Company to construct, maintain and operate utilities, plants and machinery to promote and effect the purpose generally stated above.

The application of electricity as a motive force or productive energy is a matter of common knowledge and of daily experience. The generation of electricity by the employment of the means afforded by water power is a process so familiar that neither lawmakers nor courts can be ignorant of its general practicability and wide utility. In natural consequence, where the object of the proposing condemnor is the production and distribution of electricity, as a motive power or agency, to the public, without discrimination, for the purpose of supplying power or heat, or other forces of a nature reasonably capable of promoting or affording a use or uses adapted to general comfort or convenience of all those who may desire them, the use is public within the purview of the sovereign authority of the State expressed in the phrase the right of Eminent Domain; and, when authoritatively conferred by the State, the proposing condemnor may exercise such right, according to the forms of law prescribed therefor.—Lewis on Eminent Domain, Sec. 268; Walker v. Shasta Power Co., 19 L. R. A. (N. S.), 725; Jones v. North Ga., El. Co., 6 L. R. A. (N. S.) 122; s. c. 5 A. 7 E. Anno. Cases, 526; Minn. C. & P. Co. v. Koochiching Co., 5 L. R. A. (N. S.), 638; s. c. 7 A. & E. Anno. Cases, 1182; Helena Power Co. v. Spratt, 8 L. R. A. (N. S.) 567; s. c. 10 A. & E. Anno. Cases, 1055; Minn. C. & P. Co. v. Pratt, 11 L. R. A. (N. S.), 105; Rockingham L. & P. Co. v. Hobbs, 66 L. R. A. 585; Power Co. v. Webb, 123 Tenn. 584; In re Niagara Company, 11 N. Y., App. Div. 686; 97 N. Y. Supp., 853. The first cited authority is particularly apt. We quote it. "'The furnishing of electricity to the public for light, heat and power, that is to such members of the public within a given territory as may desire the current for any or all of such purposes, is a public use for which the power of eminent domain may be exercised. 'The knowledge re-

cently acquired concerning electricity has made it possible to divide power into any desired portions and to freely transmit the same to almost any point for use. This has created a demand for power which, though not so universal as the demand for water, is nevertheless of a public character. Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires a large capital to collect, store and distribute it for general use. The cost depends largely upon the location of the power plant. A water power or a location upon tide water reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing and distributing electricity, for the purposes of supplying water and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing and distributing water for public needs—a use that is so manifestly public that it has seldom been questioned and never denied.' And where the object to be accomplished is the production and distribution of electricity to the public for any of the purposes mentioned, property and property rights may be condemned for whatever purpose is necessary to accomplish such object. Consequently land and water rights may be condemned for dams, reservoirs, canals and flumes for the creation and utilization of water power to be used in generating the electric current and for works for such generation. Also for works and rights of way for transforming, transmitting and distributing the current."

36

The power of Eminent Domain is an attribute of the sovereignty of the State. Except as restrained by organic law, it is absolute. The State may authorize its exercise by a foreign corporation, lawfully empowered to promote a public use. It may confer thereunder the right to take the property of corporations already condemned under the power of Eminent Domain. "It is not the instrumentality employed for operating the public use, but the use itself, that satisfies the constitution. The fact that the use is public and the public may have the privilege of enjoying it, is the controlling principle." Columbus Water Co. v. Long, 121 Ala. 246; Steele v. Com'rs, 83 Ala., 304; M. & C. R. R. Co. v. R. R. Co., 96 Ala., 571. If the use is public, the legislative judgment is conclusive upon the question of the expediency of authorizing the exercise of the power of Eminent Domain. Sadler v. Langham, 34 Ala. 311, 330. The impolicy of an enactment to that end is no concern of the courts. If the State has authoritatively conferred the power, the courts would be guilty of manifest usurpation if they essayed to censor the policy of the grant: if they undertook a revision through the generally questionable method of an interpretation of the enactment in the light of their notions of what would have been better policy or wiser action.

Given a purpose to confer the power of Eminent Domain for a public use and conformity to constitutional methods for legislation, the only possible objections to the validity of an enactment to that end, which prescribes for compensation for the property taken are:

(*a*) that the enactment, on its face, is too indefinite or uncer-
37 tain to be administered or, the power intended to be conferred, to be practically utilized; (*b*) that it illegally discriminates between members of the same class,—the legislature having the undoubted prerogative to classify the objects of its treatment so long as it does not arbitrarily create a class or classes. There being in the statute to be quoted no semblance of arbitrary classification, the basis for the second possible objection stated is not present. The power is broadly conferred. Under contingencies, cotton factories are the beneficiaries of an exception. Such factories as are within the exception could not be prejudiced, in any degree, by the statute. Those, only, whose rights are impinged by an enactment may complain of its constitutional invalidity. Such factories as are not within the exception must of course have their subjection to the law attributed to the broad, unclassified non-discriminatory power its terms confer. But aside from these considerations, if it should be affirmed that there is a classification in a primary sense, the discriminations are suggested by satisfactory reasons that appear from the face of the statute to have commended themselves to the lawmakers.

The statutory system upon which the asserted right of the Power Company to condemn is predicated is to be found in Article 19 of Chapter 69 (Civil Code), Secs. 3627 et seq. The main features of the system with which these appeals are concerned are set forth in section 3627. We quote it: "All corporations organized under the general laws oef this state or heretofore under a special act of the legislature, and all corporations organized under the laws of any other of the United States, and which have complied with the constitution and laws of the State of Alabama as to foreign corporations, and which by their charter have the right to manufacture, supply, and sell to the public, power produced by water as a motive force, shall, after acquiring by purchase or otherwise than by condemnation, a dam site or power site comprising not less than one acre of land upon each and opposite sides of any water course, in addition to other powers conferred by law, have the following rights, powers, and authority:

38 "To acquire by condemnation the lands and rights necessary for the construction and operation of said dam, and works connected therewith or useful thereto, either up or down stream therefrom, and (in the case of non-navigable streams) to construct and operate at said site, or other point up or down the stream therefrom, and across said stream, a dam, together with all works incident, necessary, or related thereto, and in connection therewith to impound or divert water of any water course or water courses of this state, and to raise higher such dam and to enlarge the works necessary, related or incident thereto, and to construct other works necessary, incident or related thereto, either up or down stream therefrom, as may be required or deemed expedient by such corporation, in the manufacture and supply of power produced by water as a motive force.

"To require by condemnation all lands or waters or interests or rights or easements in lands or waters likely or liable to be flooded

or damaged by impounding or diverting the water of any water course in this state, or its tributaries, or necessary for the construction or operation of dams or power houses, or works necessary, incident, or related thereto, or likely or liable to be flooded or damaged by the construction or operation or enlargement of the dams, or works incident, necessary, or related thereto, or damaged or taken in the construction, operation, or use of canals, tail-races, or exit ways necessary, useful, or convenient for the escape, conveyance or return of the water used in the operation of the works or power plant.

"To acquire by condemnation the necessary lands for substations and transmission lands, but shall have no right to condemn a private residence, nor the outhouse, garden, nor orchard within the curtilage of a private residence, for a substation site or for rights of way for its transmission line or lines. Such corporation shall have no right to condemn lands, water, or water rights in use for power purposes by another corporation upon the same water course, having similar powers essential to its operations; or lands, water, or water rights held by such other corporation for power purposes where the lands, water, or rights in themselves and taken alone or in connection with
39 other lands, water, or rights owned by such other corporation, can be made the reasonable basis of a water power development of at least one thousand continuous horse power; but may condemn lands, hydraulic structures, water, or water rights held by such other corporation at any point upon the same water course, unless the lands, structures, or rights in themselves and taken alone or in connection with other lands, water, or rights owned by such other corporation, can be made the reasonable basis of a water power development of at least one thousand continuous horse power; but may condemn lands, hydraulic structures, water, or water rights held by such other corporation at any point upon the same water course, unless the lands, structures, or rights in themselves and taken alone or in connection with other lands or rights owned by such other corporation can be made the reasonable basis of a water power development of at least five hundred continuous horse power, and may condemn lands, hydraulic structures, water, or water rights of such other corporation, at any point upon the same water course, in excess of such other corporation's actual facilities for using the same (independently of the actual or proposed works of the condemning party) for the manufacture of power by its plant as the same is already established at the time the condemnation proceeding is begun, provided the plant of such other corporation has been in operation for five years or more preceding the commencement of the condemnation proceedings. Nor shall such corporation have the right to condemn the lands, hydraulic structures, water, or water rights of any cotton factory, at any point upon the same water course, in actual and prior use by it for the operation of its plant; but may condemn the lands, hydraulic structures, water, or water rights of such cotton factory in excess of what is actually in use, or may be used at normal stages of the stream, for the operation of its plant as already established at the time the condemnation proceeding is commenced. Such corporation may by condemnation acquire the right to flood grist mills and industries in conjunction therewith, together with lands and water

rights appertaining thereto. In all cases just compensation shall first be paid to the owner in the manner provided by law for all property taken."

It is too clear for doubt that the subjects of condemnation specified in the statute are properties or easements within the
40 classes or characters of subjects of ownership which the State may, and has, if the statute is not void for uncertainty or indefiniteness, made amenable to appropriation, for a public use under the power of Eminent Domain.

From the express terms of the statute, the general authorization of certain agencies to condemn, under certain conditions, is unmistakeable. The judicial forum and proceedings therefor are plainly and validly provided. The public purpose and use to be subserved by the authorization is manifest. The compensation to be made for the property taken is stipulated as a primary condition to the appropriation. So the only possible predicate for an insistence that the statute is void for indefiniteness or uncertainty is that, either it does not define or describe the subjects authorized to be condemned, or, it fails to afford a necessary, essential means, method or formula whereby each subject of the authorization to condemn may be selected or individualized and the compensation therefor ascertained, awarded and paid.

We cannot give sanction to any feature of this hypothesis with the result to attend that the statute would be annulled, in whole or in part. To do so would require of this court the assumption in several particulars, of a common knowledge in immediate opposition to legislative declaration and enactment. In such a field as this statute intends operation and effect, this court cannot assume a superior information or wisdom to that the legislature has evinced by formal enactment. While the statute is not phrased with the clearness other writers might have attained in the expression of the ideas it is intended to express, yet it is intelligible. The elements of adverse ownership it would subject to condemnation are plainly enumerated. It is unnecessary to repeat them. It is only when it comes to except, or to define by exclusion, what measure of, and when, certain properties or easements may be appropriated under Eminent Domain that there appears a want of that high degree of clearness we are wont to expect in legal enactments or judicial pronouncements, but of the absence of which, in both, all regret to be too often aware. Notwithstanding this lack of the highest clearness, it is made manifest by unequivocal terms in the statute, that
41 condemnation is not restricted in respect of the complete devotion of the elements enumerated in the statute, to the service of the largest public use and public service, of all possible water power which may be, under engineering skill and with great outlay, applied to the generation of motive force: provided established, elder industries are not denied or deprived of the saving made to their behoof by the terms of the statute. The condemnation, except as restricted to preserve the benefits just mentioned, is not limited to the area, or things in propinquity to the dam provided for in the first paragraph in the statute. On the contrary, the clear intent ap-

pears to be to allow the conception and effectuation of a large, may be colossal, plan for the reduction to practical, serviceable energy the water power that skilled manipulation and control may extract from, or secondarily create upon, water courses in Alabama. The initial, major instrumentality for the accumulation, the condensation, as it were, of the latent, undeveloped water power must be the dam specified in the first paragraph of the statute. But the lawmakers, as we understand the statute, did not intend that the application of the power so created or accumulated should serve but once the public purpose to which it might be devoted. They contemplated, and to that end so provided that a power so, in a sense, created and so reduced to control should serve to generate a motive force so long as it might be subjected to extraction and transmission or translation as a component part of the scheme of which the dam, affording the impounding from which the accumulated power results, is the "head". Hence, it is in accord with this large conception of, and authority conferred by, the statute that, down-stream, the entity the statute describes, and which conforms thereto in respect of the initial dam, should not be limited in the effectuation of its single conception and enterprise to the neighborhood of the dam, in order that a power so created and accumulated should yield its full, unexhausted utility and energy to the public service to which the grant necessarily consecrate it. But from this authorization, made to promote and accomplish the major purpose, exceptions are made. They are the product of reason and are rested upon conditions that merited,
42 in the legislative view, conservation. Private residences, and property embraced in the curtilage are excepted from condemnation for substation sites and transmission lines. The lands, water and water rights in use for power purposes and essential to its operations, of another corporation having similar powers, are excepted. Lands, water and water rights which alone or in connection with other lands etc. can be made the reasonable basis of at least 1,000 continuous horse power are excepted. But lands corporately owned, hydraulic structures, water and water rights, at any point upon the same water course, may be condemned unless they alone or in association with others owned by the corporation can be made the basis of a water power development of at least 500 continuous horse power; and condemnation may be had, under those circumstances, of those elements of ownership "in excess of such other corporation's actual facilities for using same (independently of the actual or proposed works of the condemning party) for the manufacture of power by its plant as the same is already established at the time the condemnation proceeding is begun." Coming to provide with respect to a cotton factory, the lands, hydraulic structures, water and water rights, at every point on the same water course, in actual and prior use by the cotton factory for the operation of its plant, cannot be condemned; but the excess of what is in actual use or may be used at normal stages of the stream, for the operation of its plant as already established at the time the condemnation proceeding is commenced, may be condemned.

At the expense of repetition, after this analysis of the last para-

graph of the statute, it is to be noted that the lawmakers intended the maximum in availing of water power. The major purpose was, manifestly, to avert the waste, or unappropriation, of the excess of water power, and with that purpose in view conferred the power to condemn that the excess, in lands, hydraulic structures, water and water rights, might be husbanded and applied to the generation of a motive force. The statute's theory and purpose and literal prescription do not approximate, even, the indefiniteness and uncertainty that requires the annullment of enactments on that account; unless that factor is found in its omission to define a means, method or formula whereby the selection and distinct use of each of
43 the subjects may be effected and the compensation ascertained and awarded.

It is, necessarily, the function of the tribunal in which condemnation of this character may be had to determine, whether the statute-created conditions to the right to condemn a particular subject described in the statute exists have been met, and, it is likewise the function of that tribunal to determine whether the particular subject sought to be condemned is within or without the exceptions made in the statute. That is its jurisdiction; and when invoked,—not necessarily by an all-sufficient petition, immune from demurrer,—no other authority can rightfully interpose to stay or defeat it. If the petition is insufficient, and does not alone describe as subjects of condemnation property or easements that cannot, under any circumstances, be condemned, the petition should be tested by motion or demurrer. And we may add at this point that a good part of the argument submitted on these appeals could only have bearing or effect upon issues raised by appropriate motion or demurrer addressed to a petition to condemn.

The statute has defined the subjects of condemnation. Was it the imperative obligation of the lawmakers to prescribe a method or formula whereby each of them might be selected? These subjects of condemnation were, all must admit, fully known to the legislature. As described and enumerated by that branch of the government they do not import mere abstractions. They relate to things and natural forces familiar to all. It is not contended, and could not be, that, so far as the courts are concerned, lands, hydraulic structures, water and water rights belong to the wholly intangible,—to the realm of the unknown: for the lawmakers, within their province, have enacted to the contrary. Neither can it be judicially pronounced, with the result to attend that the statute would be, in whole or in part, annulled, that the excess of water power, initially created and accumulated by a dam higher up-stream, was and is incapable of separate ascertainment, distinct control and individual application to the generation of motive force or other form of energy. In addition to the necessary implication the statute affords,—which excludes
44 the idea that a right clearly conferred shall be unattainable because method or formula is not particularly prescribed, by the lawmakers, to select and effect the right,—the courts are bound to assume until the contrary is shown by evidence that those skilled in such matters can and will, in a proper case under general rules of

law, supply the practical knowledge and furnish the information to the appropriate tribunal that can and will render available rights, to the public benefit, which the legislature has unmistakeably conferred. If the courts should assume to pronounce void the feature of the statute that provides for the appropriation of the excess of the subjects specified in the statute, it would involve the assertion of a superior common knowledge that does not obtain and the affirmation, without sound invitation thereto, that the legislature, in these respects, wrote to no purpose. We find no warrant to annul the statute, in these particulars, in the earnest assertions of fact to that end, which, in pleading and brief, are pressed upon us. If upon the hearing of a condemnation proceeding, involving an attempt to condemn an excess the statute describes, the petitioner should fail to meet its obligation to afford the evidential data wherefrom the court may proceed to judgment in the premises, manifestly there could be no valid condemnation,—the statute's conferred right would be vain because of the petitioner's failure to meet its obligation. But, obviously, the statute would not be void. So, in omitting the prescription of method or formula for selecting, individualizing, extracting, or controlling the excess allowed to be appropriated, the statute is not invalid. The manifest legislative expectations that engineering skill would enable the courts to give full effect to the rights conferred by the statute might, in these days of great engineering skill and achievement, and until the contrary is made to appear in a concrete case, be assumed to be entirely justified. Certainly, the courts cannot, at this stage and on these records, adversely declare.

The criticism of the policy of and general effect attributed to, statute by the solicitors for the Tallassee Company have been read with interest. Whether it is well founded is not for the courts to say. Given an enactment that is intelligible on its face and offends no provision of the Constitution, State or Federal,—as this statute does not,—the courts have no choice or discretion. They must declare and administer the law as written. Its change, if desired by the people of the State, must come through legislative, not judicial action. The taking of property or easements under Eminent Domain presupposes the deprivation of the owner in the essential provision for compensation, and the theory, confirmed in the law, embraces the idea that for such deprivation the compensation awarded makes the owner whole. The inconvenience or loss that attends condemnation are all necessarily merged in the sum awarded as compensation. The rules of law for the ascertainment of the sum to be awarded are too well settled,—have been too often announced,—to need reiteration. So, too, the apprehension, if entertained, is ill-founded that, if condemnation is allowed, the condemnor may, without restraint, transgress its limits or from that point of vantage interfere with rights not condemned. The courts can and will confine every condemnor to the field of his right. It is a main office of the particularity required in the description of the subject of condemnation that the condemnor's right may be accurately, judicially ascertained and his activities or use confined thereto.

On May 25, 1912, the Power Company sought by petition to

condemn certain property and rights below the site of its proposed dam on the Tallapoosa River. Parties related in interest to the property and rights sought to be condemned were made respondents in the petition. The hearing was set for a day certain. A few days prior thereto the Judge of the Fifth Judicial Circuit issued, on the respondents' petition, rule nisi or alternative writ of prohibition requiring the stay of proceedings in or by the Probate Court in the condemnation matter and ordered the Probate Judge to show, by the next term of the Circuit Court of Tallapoosa county, why the hearing of the condemnation proceeding should not be prohibited. The ground of this petition for the writ of prohibition was that the Probate Court had no jurisdiction to proceed in the premises. An appeal was taken to this court from this order of the Judge of the Circuit, security for costs was given and a supersedeas bond
46 executed "all as provided," counsel for the Power Company assert, "by section 2843 of the Code." This is cause numbered 470 on our docket.

After this appeal was taken from the order of Circuit Judge, The Tallassee Falls Company and the other respondents in the condemnation proceeding filed their bill in the chancery court of Tallapoosa county whereby injunctive process was sought to effect the purpose manifested by the alternative writ of prohibition, it being made to appear that the Probate Court,—attributing as it did to the appeal and supersedeas the effect of rendering wholly inefficient the order for the alternative writ of prohibition,—intended, and was arranging, to proceed with the hearing and determination of the condemnation proposed. Demurrer was sustained to this bill for want of equity, and the injunction, pendente lite was dissolved. An appeal was taken. This is cause numbered 472 on our docket.

On May 11, 1912, the Power Company filed its bill, in the City Court of Montgomery, against the Tallassee Falls Company seeking injunctive process to restrain threatened resistence or interference by the defendant or its agents in order that the complainant's representatives might make the preliminary (to proceedings to condemn) investigations and surveys under Code, Sec. 3493. The motion to discharge or to dissolve the injunction pendente lite was overruled and the equity of the bill affirmed by the City Court. An appeal was taken to this Court: where this cause is given number 23. The statement, in substance, of the petitions and bills inviting this consideration, is left to the Reporter.

The petition for condemnation has been carefully considered by the court. The Statutes (secs. 3627 et seq.) upon which the right to condemn being constitutionally valid, and authority for proceedings, in the Probate Court, to that end being afforded by Code, Secs. 3860 et seq., no doubt is entertained that the jurisdiction of the Probate Court of Tallapoosa County was invoked by that petition. Its sufficiency as upon motion or demurrer is not considered. Its sufficiency is neither affirmed nor denied. The judicial power to initially hear and determine the question of the
47 freedom of the pleading from amendable defects is in this character of proceeding, alone conferred by law upon the

Probate Courts, the jurisdiction of which is invoked. Nor is it proper or necessary that this court should, at this stage, determine whether every subject of condemnation sought in the petition may be condemned. The Probate Court's jurisdiction to hear and determine having attached, that inquiry will be considered and decided by that court. The statutory system for proceeding under Eminent Domain (Code, Secs. 3860 et seq.) afford ample method and opportunity to contest and have determined every right involved; and to contest every ruling or action of the trial court during the progress of the hearing and leading to its judgment. It cannot be anticipated or presumed that error favorable or unfavorable to any party, will attend the progress of the contest through the Probate Court.

Since the writ of prohibition can legally, only, issue to prevent a usurpation of jurisdiction or an excession of jurisdiction, the alternative writ of prohibition issued by the Judge of the Fifth Circuit was improvidently issued. It is quashed and vacated. And, in sequence, the decree of the Chancellor in cause (our number) 472 is affirmed; for that bill, independent of other fatal considerations, was, in substance, but an effort to compel obedience to alternative writ improvidently issued by the Judge of the Circuit.

Under the conclusion prevailing with respect to the right to condemn provided by the statutes, our opinion concurs with that given effect by the City Court in cause numbered 23.

Code, Sec. 3493 provides: "Railroads, mining corporations, etc., may enter on land to make survey, examinations for proposed lines, works, etc.—railroads, street railroads, and mining, manufacturing, power, and quarrying, telegraph and telephone, and other corporations having rights and powers to condemn, may cause such examinations and surveys for their proposed railroads, or lines, as may be necessary to the selection of the most advantageous routes and sites, and for such purpose may, by their officers, agents, and servants, enter upon the lands and waters of any person, but subject to liability for all damages done thereto, and may, in the
48 construction of their lines or sites, cross navigable streams, but must not impede the navigation thereof; may use, cross, or change public roads, when necessary, in the construction of their railways, switches, branches, lines, or buildings, and must place the public road so crossed, used, or changed, in condition satisfactory to the county authorities having the control thereof, but where practicable the railroads must go over or under the public roadway, or railroad track, and may also cross or intersect with any other railroad or street railway, and if such crossing or intersection cannot be made by contract or agreement, may acquire the rights thereto by condemnation in the mode provided by law."

The temporary right, and consequent limited immunity (State v. Simons, 145 Ala., 95), conferred by this statute is necessarily incident to, and preliminarily of, authorized proceedings to condemn, instituted by the entities mentioned therein. Manifestly, the right thereby established is not conditioned,—otherwise than upon an authoritative prerogative to exercise the power of eminent domain,—

upon any other contingency than that the corporations mentioned shall have in contemplation,—not already instituted,—proceedings to exercise the rights and powers to condemn. The obvious purpose of the statute was to allow preparatory, preliminary investigations and surveys in order to properly prepare for, and to intelligently invoke, condemnation proceedings. The right conferred is valuable and essential to the object it has in view. The order and object and nature of this statutory right,—with reference to the later institution of condemnation proceedings,—would logically suggest a statutory authorization of the courts where condemnation proceedings are alone initiable, viz., the probate courts, to effect its intent through appropriate orders. But there appears to be no such legislative provision. In this state of the law, equity alone can vindicate and effectuate the right the statute confers. Where the entry, for the statutory purpose, is resisted or will be resisted in such a way as to render probable a clash, between the proprietor and the proposing condemnor's representatives, and the opposition of force to defeat the investigation and survey assured by the statute, no other remedy is afforded by our courts than that of in-
49 junctive process issuing upon a bill in equity fairly disclosing the right to enter for the limited temporary purpose the statute provides and showing, through appropriate averments, that the proprietor whose premises are desired to be entered, under the right created, has threatened or will resist or unduly affirmatively hinder the effectuation of such right of entry. As indicated before, the then pendency of proceedings to condemn is not essential to the equity of such a bill. The right established by this statute (sec. 3493) is conferred upon corporations of the character, and created for the purposes, of the Alabama Interstate Power Company,—the leading charter-powers of which have been mentioned. While the statute employs words in inapt relation to some kinds of "manufacturing" and "quarrying" corporations having the power to condemn, there appears from the whole statute an unmistakable legislative intent to confer the right upon corporations other than those commonly called railroad, telephone and telegraph companies. The enumeration of the repositories of the right made in the first sentence of the statute negatives the motion that only corporations intending the construction of purely transportation agencies are within the statute. The reference to changes wrought by the construction of railways etc. has no effect to qualify the ample authorization made in the first part of the statute; and these references are, of course, apt in respect of corporate proposals of the charter naturally leading to the changes such constructions may make in highways etc., and not at all inconsistent with the interpretation that the right established is conferred on "manufacturing" and other corporations having the rights and powers to condemn. We cannot read the statute in the very restricted sense in which it is contended it should be read.

Causes numbered 23 and 472 are affirmed. In cause numbered 470 judgemnt is entered quashing and vacating the alternative writ of prohibition and dismissing the petition therein.

Dowdell, C. J., Sayre and Somerville, JJ., concur.

50 On Rehearing.

Upon consideration, the applications for rehearing are denied.

Anderson, C. J., and McClellan, Mayfield, Somerville and Gardner, JJ., concur.

SAYRE, *J.* (dissenting in part):

In my opinion the completion of the dam at Cherokee Falls and the enlargement thereby of the normal power capacity of the stream is a condition precedent to the right of the Power Company to condemn the hydraulic or other structures of the Tallassee Company. Hence I think the survey of the Tallassee Falls property was undertaken prematurely and without authority to be found in the statute or elsewhere. The Tallassee Falls Company had therefore the right to prevent intrusions upon its property though made under the pretence of a preliminary survey. I hold therefore that the decree of the city court of Montgomery should be reversed.

I concur in the conclusion reached in the other cases on the ground that the questions there sought to be raised will have proper consideration in the probate court.

51 DE GREFFENRIED, *J.*, dissenting:

(1) Section 23 of the Constitution provides that "private property shall not be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner." The entire theory upon which the doctrine of eminent domain is based is that the private right in a particular piece of property shall give way to the public good. Of course coupled with the doctrine is the essential requirement that the private individual whose rights are thus invaded shall receive compensation in money for the property condemned to the public use.—People v. Salem, 20 Mich., 452, 4 Amer. Rep. 400; Sadler v. Langham, 34 Ala., 311; Western Union Tel. Co., v. S. & N. A. R. R. Co., 62 Sou. 788.

(2) Sections 3627 and 3636 of the Code of 1907 belong to the same article of the Code, relate to the same subject, are in pari materia, and, confessedly, must be read and construed together. Those sections are as follows:

"All corporations organized under the general laws of this State or heretofore under a special act of the legislature, and all corporations organized under the laws of any other of the United States, and which have complied with the constitution and laws of the State of Alabama as to foreign corporations, and which by their charter have the right to manufacture, supply, and sell to the public, power produced by water as a motive force, shall, after acquiring by purchase or otherwise than by condemnation, a dam site or power site comprising not less than one acre of land upon each and opposite sides of any water course, in addition to other powers conferred by law, have the following rights, powers, and authority;

"To acquire by condemnation the lands and rights necessary for the construction and operations of said dam, and works connected

therewith or useful thereto, either up or down stream therefrom, and (in the case of non-navigable streams) to construct and operate at said site, or other point up or down the stream therefrom, and across said stream, a dam, together with all works incident, necessary, or related thereto, and in connection therewith to impound or divert water of any water course or water courses of this State, and to raise higher such dam and to enlarge the works necessary, re-
52 lated or incident thereto, and to construct other works necessary, incident or related thereto, either up stream or down stream therefrom, as may be required or deemed expedient by such corporation, in the manufacture and supply of power produced by water as a motive force.

"To acquire by condemnation all lands or waters or interests or rights or easements in lands or waters likely or liable to be flooded or damaged by impounding or diverting the water of any water course in this State, or its tributaries, or necessary for the construction or operation of dams or power houses, or works necessary, incident, or related thereto, or likely or liable to be flooded or damaged by the construction or operation of enlargement of the dams, or works incident, necessary, or related thereto, or damaged or taken in the construction, operation, or use of canals, tail-races, or exit ways necessary, useful, or convenient for the escape, conveyance or return of the water used in the operation of the works or power plant.

"To acquire by condemnation the necessary lands for substations and transmission lands, but shall have no right to condemn a private residence, nor the outhouse, garden, nor orchard within the curtilage of a private residence, for a sub-station site or for rights of way for its transmission line or lines. Such corporation shall have no right to condemn lands, water, or water rights in use for power purposes by another corporation upon the same water course, having similar powers and essential to its operations; or lands, water, or water rights held by such other corporation for power purposes where the lands, water, or rights in themselves and taken alone or in connection with other lands, water, or rights owned by such other corporation, can be made the reasonable basis of a water power development of at least one thousand continuous horse power; but may condemn lands, hydraulic structures, water or water rights held by such other corporation at any point upon the same water course, unless the lands, structures, or rights in themselves and taken alone or in connection with other lands or rights owned by such other corporation can be made the reasonable basis of a water power development of at least five hundred continuous horse power,
53 and may condemn lands, hydraulic structures, water, or water rights of such other corporation, at any point upon the same water course, in excess of such other corporation's actual facilities for using the same (independently of the actual or proposed works of the condemning party) for the manufacture of power by its plant as the same is already established at the time the condemnation proceeding is begun, provided the plant of such other corporation has been in operation for five years or more preceding the

commencement of the condemnation proceedings. Nor shall such corporation have the right to condemn the lands, hydraulic structures, water, or water rights of any cotton factory, at any point upon the same water course, in actual and prior use by it for the operation of its plant; but may condemn the lands, hydraulic structures, water, or water rights of such cotton factory in excess of what is actually in use, or may be used at normal stages of the stream, for the operation of its plant as already established at the time the condemnation proceeding is commenced. Such corporation may by condemnation acquire the right to flood grist mills and industries in conjunction therewith, together with the land and water rights appertaining thereto. In all cases just compensation shall first be paid to the owner in the manner provided by law for all property taken." (Section 3627).

"Any corporation which exercises any of the rights conferred by this article, shall, after the completion of its works and plants, be under the duty and obligation to the public to manufacture and sell to the public electric current produced at its plants, and any corporation manufacturing, selling, and supplying power, heat, light, or electricity produced by water as a motive force under the provision of this article, must sell such power, heat, light, or electricity to any person or persons, municipal or other corporations, in the order in which requests or demands are made for such light, heat, power, or electricity. Nothing herein, however, shall be construed to require any such corporation to furnish light, heat, power, or electricity to any person or persons, corporation or corporations, until satisfied of his or its financial responsibility, and except in conformity with its reasonable rules and regulations and reasonable prices
54 for the same, and except as far as the capacity of its plant will permit." (Section 3636).

(3) I direct attention to that clause in section 3627 of the Code which declares that "any corporation which exercises any of the rights conferred by this article, shall, after the completion of its works and plants, be under the duty and obligation to the public to manufacture and sell to the public electric current," &c. In other words, under the express language of section 3627 of the Code, the Alabama Interstate Power Company will be under no duty to serve the public until it constructs its dam at the dam-site which it has obtained by purchase and at said dam site has completed its necessary works and plants. In fact a careful reading of section 3627 of the Code and of the entire article of the Code of which it forms a part convinces me that it was the plain purpose of the legislature, in said section and article to invest, first, the right of condemnation, in the corporation seeking to take advantage of its terms, of all properties necessary to the proper construction of a dam, power plant and other structures necessary and appropriate to its use for the purposes indicated in the chapter, and then, after the construction of such dam, power plant and other structures, &c., at such dam-site, second, the right to condemn, below the dam, power plant, &c., so constructed on the same stream, the unused and unneeded parts of other dams, hydraulic structures, &c. It is, of course, neces-

sary that a corporation which is chartered to serve the public shall be given the right to condemn sufficient private property to enable it to complete the works necessary to the proper performance of its public functions. In the instant case the Interstate Power Company has purchased a dam site on the Tallapoosa River, a non-navigable stream, and while it alleges in its pleadings that it has expended much money in and about its contemplated improvement, it does not allege that it has constructed or even commenced the construction of a dam, a power plant, or any other sort of hydraulic structure on said stream at said dam site or at any other point on said stream. While its pleadings abound in allegations as to what the Interstate Power Company intends in the future to do the bald fact remains that all that it really shows, by its pleadings
55 to have actually done is that it has bought, on each side of the Tallapoosa River, an acre or two of ground as a site for a dam which it intends in the future to erect for the purpose of impounding the waters of the River above the dam. I can readily see how the acquisition by the Power Company of this dam site can be held to confer upon it the right of condemnation of lands and properties above the dam site which are likely to be needed by the Company in impounding the water above the dam. I can also readily see that, if the company now needs more land than it now possesses at or near the dam-site, either up or down the stream for the purpose of properly constructing its dam, power house and other necessary structures, it should be held to possess the power to condemn such lands. In so far as the instant case is concerned, the real object of the Interstate Power Company in the purchase of the dam site must be held to have been a necessary preliminary to the erection by it of a dam or dams on the Tallapoosa River and through the water thus impounded above the dam or dams to serve the public. As it was thought by the legislature that the water thus impounded above the dam or dams would, when a Power Company authorized to exercise the powers conferred by the article, commenced operations, increase the normal flow of water in the river below the dam or dams, the legislature conferred the power, to be exercised as an incident to the real, true improvement of the river by the Power Company because of the erection of such dam or dams, to condemn the unused and unneeded portions of dams, &c., of private parties down stream. In this way the Power Company could perpetually, at all available points down the stream, get the benefit of the increased power which the water which it had impounded had added to the stream, and at the same time, do no harm to a private enterprise already established on the stream below the dam.

(4) Under the holding of the majority a foreign corporation which has obtained a license to do business in this State has, in so far as the real truth of this matter is concerned, by the purchase of an acre or two of ground on each side of the Tallapoosa River acquired the right to now condemn to its use all of the unneeded portions of every private dam on the river below the proposed dam site, although it is not required by the Act under which this
56 power of condemnation is held to have been conferred to do any service for the public until "after the completion of

its works and plants" at the proposed dam-site. In my opinion this proposed condemnation of property Ten miles below the proposed dam-site is shown by the pleadings to be totally unnecessary to the erection by the Interstate Power Company of its "works and plants", has no connection with such erection and that, until the Power Company sees proper to complete its "works and plants" no public necessity for the proposed condemnation can be shown. When the "works and plants" have been completed,—if, indeed the Power Company sees proper at some time in the future to do so,—then, according to my construction of the statute, the Power Company may be held to possess the power it now seeks to put into exercise. In my opinion the completion by the Power Company of its "works and plants" is a condition which must precede any such condemnation as is sought by this proceeding.

57 In the Supreme Court of Alabama.

ALABAMA INTERSTATE POWER COMPANY
vs.
MT. VERNON-WOODBERRY COTTON DUCK COMPANY et al.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Alabama, before you, or some of you, being the highest court in said State in which a decision could be had in the said suit between the Alabama Interstate Power Company, appellant, and the Mt. Vernon-Woodberry Cotton Duck Company, and others, appellees, wherein said appellees invoked the protection and claimed immunity under the provision of the Fourteenth Amendment to the Constitution of the United States, and under other provisions of said Constitution, and the decision of said cause denied the protection, privileges or immunity so set up and claimed under the Constitution of the United States, error hath happened, to the great damage of the said Mt. Vernon-Woodberry Cotton Duck Company, and the other appellees in said cause, as by their complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the persons aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-second day of June next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

58 Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this the 25th day of May, in the year of Our Lord One Thousand, Nine Hundred and Fourteen.

[Seal of the United States District Court, Middle District of Alabama.]

HARVEY E. JONES,
Clerk of District Court of United States for Middle District of Alabama.

Filed in office this the 25th day of May, 1914.

ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

59 In the Supreme Court of Alabama.

ALABAMA INTERSTATE POWER COMPANY
vs.
MT. VERNON-WOODBERRY COTTON DUCK COMPANY et al.

UNITED STATES OF AMERICA, *ss:*

To the Alabama Interstate Power Company, Greeting:

You are hereby cited and admonished to be at the Supreme Court of the United States at Washington, on the 22nd day of June, A. D. 1914, pursuant to a writ of error filed in the Clerk's office in the Supreme Court of Alabama, wherein the Mt. Vernon-Woodberry Cotton Duck Company, and others, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John C. Anderson, Chief Justice of the Supreme Court of Alabama, this the 25 day of May, in the year of Our Lord One Thousand Nine Hundred and Fourteen.

JNO. C. ANDERSON,
Chief Justice Supreme Court of Alabama.

Filed in Office this the 25th day of May, 1914.

ROBERT F. LIGON,
Clerk Supreme Court of Ala.

We accept service of the foregoing citation.

ALABAMA INTERSTATE POWER COMPANY,
By THOS. W. MARTIN,
RAY RUSHTON,
Its Att'ys of Record.

60 In the Supreme Court of Alabama.

ALABAMA INTERSTATE POWER COMPANY
vs.
MT. VERNON-WOODBERRY COTTON DUCK COMPANY et al.

The said appellees, the Mt. Vernon-Woodberry Cotton Duck Company, and others, having petitioned that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of Alabama, removing this cause from the State Court to the said Supreme Court of the United States, now file with their said petition the following assignments of error:

First. Said Supreme Court of Alabama erred in reversing the action of the Judge of the Fifth Judicial Circuit of the State of Alabama in granting an alternative writ of prohibition or rule nisi on the petition for prohibition filed by said Mt. Vernon-Woodberry Cotton Duck Company and said other appellees, and in dismissing and holding for naught said petition for prohibition for this, that the statutes of Alabama, under which the right of condemnation was claimed, to-wit: Sections 3627-3637 of the Code of Alabama, are (if they be held to confer the right of condemnation claimed) unconstitutional and void, as opposed to the Fourteenth Amendment to the Constitution of the United States (the protection of which was claimed and invoked in said petition for prohibition), in that said statutes deny the said Mt. Vernon-Woodberry Cotton Duck Company and said other petitioners the equal protection of the laws by authorizing the condemnation of said property and property rights, when they are owned by a corporation, and withholding such condemnation when said property is owned by persons other than a corporation.

Second. Said Supreme Court of Alabama erred in reversing the action of the Judge of the Fifth Judicial Circuit of the State of Alabama in granting an alternative writ of prohibition or rule nisi on the petition for prohibition filed by said Mt. Vernon-Woodberry Cotton Duck Company, and said other appellees, and in dismissing and holding for nought said petition for prohibition, for this, that the Statutes of Alabama under which the right of condemna-
61 tion was claimed, to-wit: Sections 3627-3637 of the Code of Alabama, are (if they be held to confer the right of condemnation claimed) unconstitutional and void, as opposed to the Fourteenth Amendment to the Constitution of the United States (the protection of which was claimed and invoked in said petition for prohibition), in that such condemnation will deprive said Mt. Vernon-Woodberry Cotton Duck Company and said other petitioners of their property without due process of law.

Third. Said Supreme Court of Alabama erred in reversing the action of the Judge of the Fifth Judicial Circuit of the State of Alabama, in granting an alternative writ of prohibition or rule nisi on the petition for prohibition filed by said Mt. Vernon-Woodberry Cotton Duck Company and said other appellees, and in dismissing

and holding for nought said petition for prohibition for this, that the statutes of Alabama under which the right of condemnation was claimed, to-wit: Sections 3627-3637 of the Code of Alabama, are (if they be held to confer the right of condemnation claimed) unconstitutional and void as opposed to the Fourteenth Amendment to the Constitution of the United States (the protection of which was claimed and invoked in said petition for prohibition), in that they deny the said defendants to said condemnation proceedings any such right of appeal, prior to the assessment of damages, as will stay any such assessment, and as will enable said defendants to revise the judgment of the Probate Court granting the prayer of said petition.

Fourth. Said Sections 3627-3637 of the Code of Alabama provide no mode of assessing the damages, nor do the eminent domain statutes, Code of Alabama, Chapter 79, Sections 3860, et seq., referred to and adopted in Section 3637 of said Code, provide an adequate mode of assessing said damages; wherefore, petitioners say that said statutes deprive petitioners of due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

Fifth. Said statutes, Code of Alabama, Sections 3627-3637, under the construction placed upon them in said final decision by the Supreme Court of Alabama, are against common right, and are therefore violative of the rights of property guaranteed by the
62 Constitution of the United States.

Sixth. Said statutes authorizing said condemnation are void, in that they are a fraud upon the State of Alabama and upon the United States, in that they authorize the erection of dams upon great water courses in the State of Alabama without the consent of the United States and without compensation either to the State of Alabama or to the United States.

Seventh. Said petition for condemnation is insufficient to confer jurisdiction, and does not afford due process of law, in that the purpose sought to be accomplished and subserved by said petition, to-wit: the sale of power generated by water, is not a public purpose.

Eighth. And petitioners assign as error separately and severally each of the eighteen grounds of objection urged in said petition for prohibition, as if each were here fully set out.

J. M. CHILTON,
H. N. RANDOLPH, &
GOODWYN & McINTYRE,
Att'ys for Plaintiffs in Error.

Filed in office this 25th day of May, 1914.

ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

63 In the Supreme Court of Alabama.

ALABAMA INTERSTATE POWER COMPANY
vs.
MT. VERNON-WOODBERRY COTTON DUCK COMPANY et al.

To the Honorable John C. Anderson, Chief Justice of the Supreme Court of Alabama:

Now comes the Mt. Vernon-Woodberry Cotton Duck Company, a corporation under the laws of the State of Delaware; the Continental Trust Company, a corporation under the laws of the State of Maryland, as Trustee; the International Trust Company of Maryland, a corporation under the laws of the State of Maryland, as Trustee; the Tallassee Falls Manufacturing Company, a corporation under the laws of the State of Alabama, and the Consolidated Cotton Duck Company, a corporation, by their attorneys, John M. Chilton, H. N. Randolph and Goodwyn & McIntyre, and complain and allege that they are citizens of the United States of America, and that in the above entitled cause, on the 4th day of December 1913 a final judgment was rendered against your petitioners by the Supreme Court of Alabama, that being the highest court of law or equity in the State of Alabama; that subsequently a petition for re-hearing was filed by said appellants in said cause, which was over-ruled on to-wit: the 14th day of May, 1914.

Petitioners state that said proceedings were begun in the Probate Court of the County of Tallapoosa, State of Alabama, by a petition filed by the Alabama Interstate Power Company on to-wit: the 25th day of May, 1912, against your petitioners, wherein it was sought to condemn under and by virtue of Article 19 of the Code of Alabama of 1907, composed of Sections 3627-3637 of said Code, and under the statutes referred to therein as a part thereof, certain property on the Tallapoosa River at Tallassee, Alabama, of which said Tallassee Falls Manufacturing Company was alleged to be in possession, and in which property your other petitioners were alleged to have an interest as Trustees, under deeds of trust or otherwise, to-wit:

64 A location for a power house for the accommodation of turbines, water wheels, and other hydraulic and electric machinery, said location consisting of that certain lot or parcel of land just below the dam, known as the Tallassee dam, and described by reference to a map attached to said petition for condemnation; also to condemn the right to make an opening in said dam of the width, to-wit: of 200 feet for the purpose of conducting water through said opening to said power house; also to condemn the right to use a certain spur-track of railway *ten* extending from the depot in the town of Tallassee, Alabama, across the Tallapoosa River, to the factories operated by said Tallassee Falls Manufacturing Company, and to condemn lands for the purpose of extending said railroad to the power house proposed to be erected below said dam; also to condemn land for a tail-race below said power house; also the water flowing down the Tallapoosa River at and over said dam in the possession

of the Tallassee Falls Manufacturing Company, and the right to use the same in the generation of electricity for sale to the public, in excess of what is or may be used by said defendants to said petition at normal stages of the stream, etc.

In said petition, the petitioner, the Alabama Interstate Power Company, alleged, in substance, that it was a corporation chartered under the laws of Maine, and had complied with all the laws of the State authorizing foreign corporations to engage in business in the State of Alabama; that said petitioner was authorized by its charter to manufacture, supply and sell to the public power produced by water as a motive force, and with all other powers, privileges, franchises and immunities which are or may be required to carry such charter rights into effect, including the right to construct and complete a dam or dams, power house or power houses, etc., and to divert or otherwise use water in the construction of its plants and the operation of its factories.

The said petitioner had acquired by purchase a dam or power site within the State of Alabama, comprising not less than one acre of land, on each and opposite sides of the Tallapoosa River, in Section 36, Township 20, Range 21, the East abutment site of which is in Tallapoosa County, and the West abutment site of which is in Elmore County, in said State of Alabama; that the Tallapoosa River
65 was a non-navigable water course in Alabama, and that petitioner was then engaged in constructing and proposed to operate at said site and across said river, a dam for the manufacture and supply of power produced by water as a motive force for the public, and was preparing to impound the water of said Tallapoosa River at said point.

It is alleged that said Tallassee Falls Manufacturing Company, the Mt. Vernon-Woodbury Cotton Duck Company and the Consolidated Cotton Duck Company "own and operate two cotton factories in the northeast quarter of Section 19, Township 18, North, Range 22, East, in Tallapoosa and Elmore Counties, Alabama, one of which factories is located on that part of the northeast quarter of Section 19, lying East of the Tallapoosa River, and the other of said factories being located on that part of the northeast quarter of said Section 19, lying West of the Tallapoosa River, in Elmore County, Alabama, and that in connection with said cotton factories said defendants had erected a dam across the Tallapoosa River in the northeast quarter of Section 19, together with hydraulic structures by means of which they generated a limited amount of water power produced by water from the river, but greatly less than the capacity of the river; that by reason of the erection of the dam of the petitioner, the Alabama Interstate Power Company, upon and across the Tallapoosa River in said Section 36, Township 20, Range 21, the flow of the water of said Tallapoosa River would be greatly increased at certain seasons of the year, resulting in the erection of water power greatly in excess of what was then in actual use by them at normal stages of the Tallapoosa River in the operation of said cotton factories as established at the time the condemnation proceeding was commenced.

It thereupon sought to condemn the property herein referred to,

and offered to make payment of the property sought to be condemned. There was a prayer for process against the parties made defendants aforesaid to said petition.

Your petitioners state that being advised by counsel that the Probate Court of Tallapoosa County was for many reasons without jurisdiction to hear and determine said particular condemnation proceedings, your petitioners on to-wit: the 21st day of June, 1912, presented to the Honorable S. L. Brewer, as Judge of the Fifth Judicial
66 Circuit of the State of Alabama, their petition in writing in which your petitioners alleged in substance the filing of said petition for condemnation in the Probate Court of Tallapoosa County, and attached a copy thereof, and in which petitioners alleged that said Probate Court was without jurisdiction to grant the prayer of said condemnation petition, for eighteen (18) grounds or reasons, numbered respectively from 1 to 18, inclusive.

The fourth ground of objection urged in said petition for prohibition was as follows, to-wit:

"(4) That the statutes of Alabama under which said rights are claimed, to-wit: Sections 3627-3637 of the Code of Alabama, are, if they confer said rights, unconstitutional and void, as opposed to the Fourteenth Amendment to the Constitution of the United States (the protection of which is hereby claimed) in that they deny to your petitioners equal protection of the laws by authorizing the condemnation of said property and property rights when they are owned by a corporation and withholding such rights of condemnation when said property is owned by persons other than a corporation."

Ground No. 5 among said 18 grounds, was as follows, to-wit:

"(5) The statutes under which said rights are claimed, to-wit: Sections 3627-3637 of the Code of Alabama, are, if they confer said rights, unconstitutional and void as opposed to the Fourteenth Amendment of the Constitution of the United States (the protection of which is hereby invoked) in that such condemnation will deprive your petitioners of their property without due process of law."

In the sixth ground of said objection, it was insisted as follows:

"(6) The statutes of Alabama under which said rights are claimed, to-wit: Sections 3627-3637 of the Code of Alabama, are, if they confer said rights, opposed to the Fourteenth Amendment to the Constitution of the United States (the protection of which is hereby invoked) in that they deny to the defendant to said condemnation proceedings any right of appeal prior to the assessment of damages, as will stay any such assessment and as will enable said defendant to revise the judgment of the Probate Court granting the prayer of said petition."

The thirteenth ground of said objection was as follows:

67 "(13) The statutes of Alabama under which said condemnation is sought, to-wit: Sections 3627-3637 of the Code of Alabama, are, if they confer said rights, unconstitutional and void as opposed to the Constitution of the United States and of the State of Alabama (the protection which is hereby invoked) in that such condemnation would deprive your petitioners of their property without due process of law."

The fourteenth ground of said objection was as follows:

"(14) It appears from said petition that with the claimed ownership of at least one acre of land on each and opposite sides of the Tallapoosa River at or near Cherokee Bluff, as a predicate, said plaintiff is seeking to condemn the property of your petitioners situated many miles down the stream from the point where said two acres are located, and that the property so sought to be condemned has and is to have no physical relation to said enterprise at Cherokee Bluff. And petitioners thereupon aver that if the statutes of Alabama under which said proceeding is instituted, confer any such rights as are claimed in said petition, said legislation is arbitrary, oppressive and against common right, and deprives the owner of his property without due process of law and without necessity therefor, and is confiscatory in its nature."

Your petitioners aver that in and by said petition for condemnation, each of said eighteen grounds of objection, including those hereinabove set forth, were also addressed separately to that part of said petition for condemnation "as seeks or in which it is sought to condemn a section of your petitioners' dam," and avers that said Probate Court is without jurisdiction in said petition in said aspect, or would exceed its jurisdiction in granting said petition in said aspect.

Said eighteen grounds of objection were also urged separately against so much of the petition for condemnation as sought to condemn to the use of the Alabama Interstate Power Company the railroad already constructed, as described in said petition.

And said eighteen grounds of objection were also separately urged to said petition for condemnation in that aspect in which it sought to condemn certain lands as a site for a power house, and said
68 eighteen grounds were also interposed separately and severally to so much of said petition as sought to condemn lands for transmission lines and sub-stations; and said eighteen grounds of objection were also presented to so much of said petition as sought to condemn each piece of the property described therein.

It was alleged in said petition for prohibition that the Circuit Judge had announced his intention to try said cause, and would try it unless prohibited.

Petitioners refer to said petition for prohibition for a full statement of the grounds alleged therein, and refer to said petition for condemnation which is made and exhibit to said petition for prohibition.

It was prayed in said petition that an alternative writ might be issued, returnable to the next term of the Circuit Court of Tallapoosa County, requiring said probate judge to show cause why he should not be prohibiting from exercising the jurisdiction to hear and determine said proceedings, and that said alternative writ also issue to the Alabama Interstate Power Company, which was under the practice prevailing in Alabama, also made a defendant to said petition.

Petitioners state that on the presentation of said petition to Honorable S. L. Brewer, Judge as aforesaid, said Judge granted the

alternative writ or Rule nisi, as prayed, and prohibited the probate court of Tallapoosa County, and the Judge thereof, from making any further orders in the matter of said petition, and prohibited the petitioner therein from further prosecuting the same, requiring said judge and said petitioner to show cause at the next term of said Circuit Court why the writ should not be made final. Said Judge, however, required that your petitioners execute a bond in the sum of Three Thousand ($3,000.00) Dollars, as a condition to said rule nisi, operating as a supersedeas, and your petitioners at once gave said bond and it was approved by said Judge.

Petitioners allege that under the statutes of Alabama, to-wit: Section — of the Code of Alabama of 1907, as construed by the Supreme Court of Alabama, the right was claimed by the Ala-
69 bama Interstate Power Company to appeal immediately from the granting of the rule nisi or alternative writ, to the Supreme Court of Alabama, and the further right was claimed to supersede the said writ by executing a supersedeas bond; and on the 26th day of June, 1912, said appeal was taken by the Alabama Interstate Power Company, and said supersedeas bond executed, and said cause was thereupon appealed to the Supreme Court of Alabama and the record thereof was transmitted to said Supreme Court. Petitioners aver that on to-wit: the 14" day of May, 1914, said Supreme Court determined said cause in favor of the said appellant, the Alabama Interstate Power Company, and rendered a final judgment in and by which said Supreme Court reversed the action of said Circuit Judge in granting said alternative writ or rule nisi, and rendered a judgment finally dismissing the petition for prohibition filed by your petitioner- as aforesaid, all of which will appear from a copy of the record and proceedings in said cause, which is here referred to as a part of this petition.

Petitioners state that said judgment of the Supreme Court of Alabama *reversed* the action of said Circuit Judge, and dismissing said petition for prohibition necessarily involved a determination, adversely to your petitioners, of the Federal questions presented by said several objections, and that in so determining said questions, this Honorable Court has denied to your petitioners the right claimed under the laws of the United States and invoked in said several grounds of objection hereinabove referred to and set forth.

Therefore your petitioners pray the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of Alabama and the Judges thereof, to the end that the record in said proceeding may be removed into the Supreme Court of the United States, and the error complained of by your petitioners may be examined and corrected and said judgment reversed.

And petitioners herewith present and file their assignments of error in said cause, and pray that the same may be allowed, and pray that this Honorable Court will fix the amount of a supersedeas bond
which will stay further proceedings pending the hearing of
70 said proceedings in the Supreme Court of the United States.

And your petitioners pray that such order will be made as

will supersede said judgment; and your petitioners will ever pray, etc.

J. M. CHILTON,
H. N. RANDOLPH,
GOODWYN & McINTYRE,
Attorneys for Petitioners.

Allowed this the 25th day of May 1914.

JNO. C. ANDERSON,
Chief Justice of the Supreme Court of Alabama.

Filed in office this 25th day of May 1914.

ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

71 In the Supreme Court of Alabama.

ALABAMA INTERSTATE POWER COMPANY
vs.
MT. VERNON-WOODBERRY COTTON DUCK COMPANY et al.

The above entitled matter coming on to be heard upon the petition of said appellees therein for a writ from the Supreme Court of the United States to the Supreme Court of the State of Alabama, and upon examination of said petition and the record in the matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States, and that the supersedeas bond of said petitioners, to be executed by or in behalf of said petitioners, be and is hereby fixed in the sum of Three Thousand ($3,000.00) Dollars, conditioned as required by Section 1007 of the Revised Statutes of the United States.

This 25th day of May, A. D. 1914.

JNO. C. ANDERSON,
Chief Justice Supreme Court of Alabama.

Filed in office this 25th day of May, 1914.

ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

[Endorsed:] Allowance Writ of Error.

72 In the Supreme Court of Alabama.

ALABAMA INTERSTATE POWER COMPANY
vs.
MT. VERNON-WOODBERRY COTTON DUCK COMPANY et al.

On Writ of Error to the Supreme Court of the United States.

Know all men by these presents That we, the Continental Trust Company, Trustee, and the Mt. Vernon-Woodberry Cotton Duck Company, as principals, and *U* Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the Alabama Interstate Power Company in the full and just sum of three thousand dollars to be paid to the said Alabama Interstate Power Company, its successors or assigns to which payment well and truly to be made we bind ourselves and each of us, our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 26th day of May, 1914.

Whereas lately at a session of the Supreme Court of Alabama in a suit pending in said court between the Alabama Interstate Power Company, appellant, and the Mt. Vernon-Woodberry Cotton Duck Company, and others, appellees, a final judgment was rendered against said appellees; and the said Mt. Vernon-Woodbery Cotton Duck Company, and others, appellees, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said Alabama Interstate Power Company is about to be issued citing and admonishing it to be and appear at the United States Supreme Court to be holden at Washington:

Now, the condition of the above obligation is such, that if the said Mt. Vernon-Woodberry Cotton Duck Company and the other parties to said writ of error, shall prosecute their writ of error to effect and shall answer all damages and costs, that may be awarded against them if they fail to make their plea good, then the above ob-
73 ligation to be void; otherwise, to remain in full force and virtue.

THE CONTINENTAL TRUST CO., *Trustee,* [L. S.]
By JOHN M. CHILTON, *Att'y in Fact.*
THE MT. VERNON-WOODBERRY COTTON DUCK CO., [L. S.]
By JOHN M. CHILTON, *Att'y in Fact.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [L. S.]
By W. A. SAFFOLD, *Its Agent in Fact.* [L. S.]

Approved this the 27th day of May, 1914.
JOHN C. ANDERSON,
Chief Justice.

Filed in office this the 27th day of May, 1914.
ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

74 In the Supreme Court of Alabama.

MT. VERNON-WOODBERRY COTTON DUCK COMPANY et al.
vs.
ALABAMA INTERSTATE POWER COMPANY.

I, Robert F. Ligon, Clerk of the Supreme Court of the State of Alabama, by virtue of the within writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 73, both inclusive, contain a true, full and complete transcript of the record and proceedings had in said Court, together with a true and correct copy of the opinion of said Court, in the case of Mount Vernon-Woodberry Cotton Duck Company, et al. vs. Alabama Interstate Power Company (5 Div. 470), and the original writ of error, the original citation and acceptance of service, the original assignments of error, the petition for the writ of error, and the order allowing the writ, and copy of the writ of error bond, as the same appears upon the files and records of said Supreme Court.

In testimony whereof, I have hereunto affixed my official signature, as Clerk of the Supreme Court of Alabama, *to be hereunto affixed*, at the Capitol, in the City of Montgomery, on the 13th day of June 1914, A. D.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No. 24,306. Alabama Supreme Court. Term No. 200. Mt. Vernon-Woodberry Cotton Duck Company et al., plaintiffs in error, vs. Alabama Interstate Power Company. Filed July 9, 1914. File No. 24,306.

SUPREME COURT, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 200.

MT. VERNON-WOODBERRY COTTON DUCK COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

ALABAMA INTERSTATE POWER COMPANY.

REPLY BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

H. N. RANDOLPH,
EDWIN G. BAETJER,
Attorneys for Plaintiffs in Error.

(24,306)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 200.

MT. VERNON-WOODBERRY COTTON DUCK COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

ALABAMA INTERSTATE POWER COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF ON MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR.

Defendant in error moves the court to dismiss the writ of error on the ground that the judgment sought to be reviewed is not "a final judgment in a suit," as required by section 237, Judicial Code.

The judgment in question is one of the Supreme Court of Alabama dismissing plaintiff in error's petition for writ of prohibition and reversing the order of the Circuit Court of Tallapoosa County, and is as follows:

> "Come the parties by attorneys, and the record and matters therein assigned for errors being argued and submitted, and duly examined and understood by the court, it is considered in the record and proceedings

> of the circuit court there is manifest error. It is therefore considered that the judgment or order of the judge of said circuit court granting the alternative writ of prohibition in said cause is reversed and annulled, and this court proceeding to render the judgment or order the circuit judge should have rendered, doth order and adjudge that the judgment or order granting the alternative writ of prohibition is vacated and annulled, and that the petition for same be and is dismissed at the cost of the petitioners, for which costs execution may issue. It is also considered that the appellees pay the costs of appeal of this court and of the circuit court."
>
> (Record, page 24.)

Error was assigned by the plaintiffs in error upon this judgment, and brought this writ of error by virtue of section 237, Judicial Code, the pertinent parts of which, setting out the cases in which the Supreme Court shall have appellate jurisdiction, are as follows:

> "A *final* judgment or decree in any *suit* in the highest court of a State in which a decision in the suit could be had * * * or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity."
>
> Hopkins' Judicial Code, page 203.

1.

Prohibition is a *suit* within the meaning of this act.

Weston *vs.* Charleston, 2d Peters, 449.

Smith *vs.* Whitney, 116 U. S., 167.

Tyler *vs.* Judges of Court of Registration, 179 U. S., 405-411.

See Taylor on Jurisdiction & Procedure in U. S. Supreme Court, section 184.

The Alabama law of prohibition is contained in sections 4864, 4865, 4866, 4867, and 4872 of the Code of Alabama of 1907 and is as follows:

"SECTION 4864. *Application for; pleadings and right of amendment.* All applications for mandamus, prohibition, certiorari, or other remedial writ of a supervisory nature, shall be commenced by a petition verified by affidavit, in which the facts shall be stated as briefly and succinctly as the case will admit of; and any defendant may demur, plead, or answer as to all such matters as may be necessary to his defense; and any of the pleadings in such proceedings may be amended as often as occasion may require to attain the ends of justice, and by striking out parties and adding new parties; and upon the issues thus presented, the court shall award the relief, if any, to which the petitioner is entitled.

"SECTION 4865. *Truth or sufficiency of answer may be put in issue.* In any such proceeding, the return or answer shall not be conclusive, but the truth or sufficiency thereof may be put in issue and controverted.

"SECTION 4866. *Appeal to Supreme Court; a preferred case to be decided at first term.* From the final judgment of any circuit court or other court exercising the jurisdiction of such court, in any such proceeding, an appeal shall lie to the Supreme Court as in other cases; but such appeal must be taken within thirty days after the final judgment is rendered, and shall be a preferred case in the Supreme Court, and shall be decided at the first term to which it is taken.

"SECTION 4867. *Bill of exceptions taken; judgment on appeal.* In addition to the questions which may be presented on such appeal to the Supreme Court for review under existing laws and rules of court, either party may, by a bill of exceptions, also present for review the judgment of the court upon the evidence; and the Supreme Court shall review the same, and, in case there is error, shall render such judgment in the cause as the primary court should have rendered, or reverse and remand the same for

further proceedings, as to the Supreme Court may seem right."

"SECTION 4872. *Common law not repealed; certain proceedings excepted from operation of this chapter.* The common law, as now in force in this State, touching any of the matters embraced in this chapter, is not repealed, but left in full force; the true intent and meaning of this chapter being to provide a plain, more speedy, and less expensive mode of procedure in all cases to which it applies; nor shall the provisions of this chapter be held to apply to a certiorari obtained in the Supreme Court, upon a suggestion of diminution of the record; nor is anything in this chapter contained intended to repeal, alter, or change any statute of this State, now in force, in reference to proceedings for *habeas corpus* or mandamus."

It is seen from the section last quoted that prohibition in Alabama remains as at common law, and therefore the case of Weston *vs.* Charleston, *supra,* is declaratory of the law of prohibition in so far as it is here cited as authority.

Prohibition has often been resorted to to redress wrongs when applicable.

In the case of Weston *vs.* Charleston, *supra,* which is the leading authority on the subject, Chief Justice Marshall, delivering the opinion of the court holding that prohibition was a suit, said:

"Is a writ of prohibition a suit? The term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court; and at his sugges-

> tion, a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals; and, in the highest court, the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit."

Certainly this language fits the case at bar precisely. Here the constitutionality of a statute is contested; the party aggrieved appeals to the circuit court, and at his suggestion an alternative writ of prohibition, the appropriate remedy, is issued; the opposite party appeals, and in the highest court of Alabama the judgment is reversed and judgment is given for the defendant.

2.

The judgment dismissing petition for writ of prohibition is final.

> Weston *vs.* Charleston, 2d Peters, 449.
> Colorado Eastern Ry. Co. *vs.* Union Pacific R. R. Co., 94 Fed., 312.
> Tippecanoe County *vs.* Lucas, 93 U. S., 108.

The rule as to what is a final judgment is excellently well stated by Chief Justice Marshall in the following language:

> "The words final judgment must be understood in the section under consideration as applying to all judgments and decrees which determine a particular cause."
>
> Weston *vs.* Charleston, 2d Peters, 449.

The rule is elsewhere stated as follows:

> "A judgment to be final must be such a one that should this court affirm the judgment below there would remain nothing to be done by the lower court save to execute its judgment."
>
> Bostwick *vs.* Brinkerhoff, 106 U. S., 3, and cases cited.

There can be no doubt as to what the particular cause is in the case at bar, as determined by the judgment of the Supreme Court of Alabama. It is plainly the right to, or the lack of right to, the relief prayed for in the petition for prohibition filed by plaintiff in error in the Circuit Court of Tallapoosa County. The petition is, by order of the Supreme Court of Alabama, dismissed and all the prayers therein contained denied.

A judgment of dismissal is a final judgment.

Colorado Eastern Ry. Co. *vs.* Union Pacific R. R. Co. (*supra*).

The opinion of the Circuit Court of Appeals of the 8th Circuit in the case last cited is, in part, as follows:

> "The defendant in error moves to dismiss the writ of error upon the ground that the dismissal of a cause for want of prosecution is not subject to review by an appellate court. The motion must be denied. An order of dismissal for want of prosecution and a judgment for costs against plaintiff is a final judgment from which an appeal will lie. To constitute a final judgment, it is not essential that it should be a bar to another suit."

In the present case the Supreme Court of Alabama reversed the order of the circuit court granting an alternative writ of prohibition, and in so doing ruled on the correctness of a purely interlocutory order. However, acting under the authority of section 4867, Code of Alabama, 1907, above set out, and "rendering the judgment which the lower court should have rendered," the Supreme Court finally disposed of the entire cause of action by dismissal, and in so doing brought its judgment within the rule laid down in Tippecanoe County *vs.* Lucas, 93 U. S., 108, which was a case in which a temporary injunction was appealed from. The Supreme Court of the State dissolved same and remanded the cause to the lower court with instructions to dismiss the petition, the question being raised to the jurisdiction of the

United States Supreme Court on the ground that there was no final judgment. Mr. Justice Field, delivering the opinion therein, said:

> "It is objected, *in limine,* that this court has no jurisdiction of the cause, on the alleged ground that the judgment rendered is not a final judgment. The order of the circuit court, granting a preliminary injunction, was, it is true, interlocutory, and, if the judgment of the Supreme Court of the State had been limited to a simple reversal, the objection would have been tenable. The cause would then have remained in the circuit court for further proceedings. But the direction to that court, accompanying the reversal of its order to dismiss the complaint, made a final disposition of the cause. With the entry of that judgment the cause was at an end. * * * If, by any direction, the entire cause is, in fact, determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, subject in a proper case to our review, whatever may be its technical designation."

The Supreme Court must always look to the form of the judgment sought to be reviewed in order to determine the question of its finality.

Haseltine *vs.* Banks, 183 U. S., 130.

Missouri & Kansas Int. Ry. Co. *vs.* Olathe, 222 U. S., 185.

La. Nav. Co. *vs.* Oyster Ass'n of La., 226 U. S., 99.

In the Haseltine case Mr. Justice Brown, stating the opinion of the court, uses the following language:

> "We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case."

The total denial by the Supreme Court of Alabama of the petition for prohibition is certainly a final determination of

the merits of the plaintiff in error's claim for the relief prayed in said petition.

Cook *vs.* Cook, 18 Fla., 636.

Atlanta *vs.* First Methodist Church, 83 Ga., 449.

Defendant in error, in its brief supporting the motion to dismiss, assumes the position that the prohibition proceeding in the circuit court and the condemnation proceeding in the probate court sought to be prohibited are one and the same suit or cause.

Mr. High in the 3d edition of his great work on Extraordinary Legal Remedies, paragraph 768, expresses the relation between a prohibition proceeding and the proceeding sought to be prohibited as follows:

> "As regards the nature of the proceeding or action in prohibition, it is to be observed that it is in *no sense a part* or continuance of the action prohibited by removing it from a lower to a higher court for the purpose of obtaining a decision in the latter tribunal. So far from this it is regarded as wholly collateral to the original proceeding, being intended to arrest the proceeding and to prevent its further prosecution by a court having no jurisdiction of the subject-matter in dispute. * * * It is manifest, therefore, that the remedy by prohibition *is distinct from and independent of the original proceeding,* although collateral to it, and that whether the original action is civil or criminal the nature and object of the remedy by prohibition are the same, it being a civil proceeding to prevent the further exercise of an unwarranted jurisdiction."

Under its erroneous conception of the nature of prohibition proceeding, defendant in error, in support of its contention that the judgment of the Supreme Court of Alabama is not a final one, cites the following authorities:

Benjamin *vs.* Dubois, 118 U. S., 46.

Dainese *vs.* Kendall, 119 U. S., 53.

Keystone Manganese & Iron Co. *vs.* Martin, 132 U. S., 91.

Meagher *vs.* Minn. Thresher Mfg. Co., 145 U. S., 608.
Union Mutual Life Ins. Co. *vs.* Kirchoff, 160 U. S., 374.
Great Western Tel. Co. *vs.* Burnham, 162 U. S., 339.
Clark *vs.* Kansas City, 172 U. S., 334.
Grant *vs.* Phœnix Mutual Life Ins. Co., 106 U. S., 429.
Moses *vs.* Mayor, 15 Wallace, 387.
Loeber *vs.* Shroeder, 149 U. S., 580.
Schlosser *vs.* Hemphill, 198 U. S., 173.
Hazeltine *vs.* Central National Bank, 183 U. S., 130.
Mo. & Kansas Int. Ry. Co. *vs.* Olathe, 222 U. S., 185.
La. Nav. Co. *vs.* Oyster Com., 226 U. S., 99.

Plaintiff in error contends that these authorities are aside from the question involved in this case and herewith takes up each case separately for examination by the court.

The case of Benjamin *vs.* Dubois, 118 U. S., 46, was a suit filed for money in the hands of an administrator. The question of jurisdiction of the lower court was raised in the answer to the petition and was settled by the lower court at special term in favor of the jurisdiction. An appeal was taken to the general term on this one question of jurisdiction, and further appeal, still upon this same one question, was brought to the United States Supreme Court. It was held that the judgment was not a final one, because it did not dispose of the entire cause of action, but left the claim for money, for which the suit was filed originally, still to be disposed of. This case is in no sense analogous to the one at bar.

The case of Dainese *vs.* Kendall, 119 U. S., 53, was a bill filed at special term of the Supreme Court of the District of Columbia, praying for, first, the setting aside of a certain sale made by a trustee under power of sale contained in a trust deed; second, an account between the purchaser at the sale and the plaintiff, and, third, an account between the

holders of the notes secured by the deed of trust and the trustee. The lower court at special term made an order setting aside the sale. Appeal was taken to the general term upon this one question without regard to the other points—that is, the accountings prayed for. The appellate court reversed the court at special term and remanded the case for further proceedings. The case came back to the lower court; it was referred to an auditor for accounting, but before the account could be taken appeal was entered to the Supreme Court of the United States. This case was dismissed on motion as not being an appeal from a final judgment, the entire cause not being disposed of.

In Keystone Manganese & Iron Co. *vs.* Martin, 132 U. S., 91, the appeal to the United States Supreme Court was taken from the order granting an injunction and referring an account to a master, the prayer of the original bill being for both an injunction and the accounting. The judgment was held not final in the following words:

> "The decree is not final, because it does not dispose of the entire controversy between the parties. The bill prays only for an injunction and an account of the quantity and value of the ore taken from the land by the defendant. The injunction is granted, but the account remains to be taken."

In Meagher *vs.* Minn. Thresher Mfg. Co., 145 U. S., 608, the bill was for a receiver, etc. One of the creditors, by intervention petition, prayed for certain shareholders to be made parties and forced to pay their subscriptions. A general demurrer was filed to the intervening petition, which demurrer was overruled. On appeal, the lower court was sustained in its ruling on the demurrer, which order, under the law of the State, brought about a remand for further proceedings. Such judgment was held not final, as not disposing of the entire cause.

This case, with many others, merely illustrates the well-settled doctrine that, if the judgment be one of reversal by

which the case is remanded for further proceedings in the lower court, the judgment is not final.

The case of Union Mutual Life Insurance Co. *vs.* Kirchoff, 160 U. S., 374, was one in which the judgment was one of reversal, remanding the case for further proceedings in the lower court, to wit: An accounting. Under the rule just above stated this is clearly no final judgment.

Great Western Tel. Co. *vs.* Burnham, 162 U. S., 339, was a case of judgment in the State appellate court remanding the case for further proceedings, followed by a judgment of the lower court in conformity with the opinion of the appellate court. It was held in this case that the United States Supreme Court was without jurisdiction, because the judgment was not a final judgment from the highest court in which a decision may be had, the appeal in this case being from the second judgment of the lower court, and not from the judgment of the appellate court.

The judgment in Clark *vs.* Kansas City, 172 U. S., 334, was a case from which an appeal was taken to the United States Supreme Court, overruling a demurrer where there was still a right to amend pleadings and proceed further in the lower court.

Grant *vs.* Phœnix Life Insurance Co., 106 U. S., 629, is another case in which there still remained an account to be taken in the lower court.

The bill in the case of Moses *vs.* Mayor, 15 Wallace, 387, prays for injunction and other relief. The judgment of the appellate court of the State simply disposed of the question of injunction, leaving the case to proceed further in the lower court upon the other prayers in the bill.

In Loeber *vs.* Shroeder, 149 U. S., 580, the judgment was one overruling a motion to quash a *fi. fa.*, said *fi. fa.* issuing in execution of a judgment previously rendered. The court held that a judgment on such a motion was not a final judgment in a suit. It is apparent in this case that the judgment upon which the *fi. fa.* was issued was the judgment in the suit, and not that refusing to quash the *fi. fa.*

The cases of—

Schlosser *vs.* Hemphill, 198 U. S., 173;
Haseltine *vs.* Bank, 183 U. S., 130;
La. Nav. Co. *vs.* Oyster Com., 226 U. S., 99;
Lodge *vs.* Twell, 135 U. S., 232;
Mo. & Kansas Int. Ry. Co. *vs.* Olathe, 222 U. S., 185,

were all appeals taken to the Supreme Court to review judgments of reversal and remand for further proceedings in the lower court. It is readily seen that cases of this type have no application to the case at bar, as the judgment here was one of absolute dismissal of the petition and not of simple reversal.

The case of Bostwick *vs.* Brinkerhoff, 106 U. S., 3, was a suit by stockholders of the company against the directors thereof for negligent management of the corporate business; a demurrer was filed and sustained in the lower court; the appellate court reversed the judgment sustaining the demurrer (with leave to defendants to withdraw demurrer and answer). This case therefore would seem to come practically within the same class as the Haseltine case above, in which there is a reversal with remand for further proceedings.

We have demonstrated, we submit, first, prohibition is a suit; second, the judgment in the case at bar is a final judgment, and is therefore one properly reviewed by this court under section 237, Judicial Code.

3.

The fourth paragraph of defendant in error's motion is as follows:

> "*Fourth.* No Federal question is presented by a final judgment or decree of the Supreme Court of Alabama in such manner as to be now subject to review by this court."

A casual reading of this paragraph leads one to believe that defendant in error is therein questioning the jurisdiction

of this court on the ground that there is *no final judgment.* If this be the proper construction of its meaning, what has been said above also answers the contention embodied in this paragraph.

If, however, defendant in error contends that there is no Federal question raised in this case, we respectfully refer the court to the main brief of plaintiff in error filed in this case, and especially to the assignments of error 1 to 8, inclusive, as set out therein, and on pages 43 and 44 of the record.

What is a Federal question such as will support an appeal to this court? Mr. Taylor in his work on the Jurisdiction and Procedure of the United States Supreme Court, paragraph 188, following the language of section 237, Judicial Code, enumerates the classes of cases reviewable. He states the second class as follows:

> "or there must have been drawn in question a statute of, or an authority exercised under, a State, upon the ground of repugnancy to the Constitution or a law or treaty of the United States; and the decision must have been in favor of the validity of the State law or authority in question."

In the present case the constitutionality of sections 3627 to 3637, inclusive, of the Code of Alabama, 1907, was expressly brought into question, the plaintiff in error contending that the same were repugnant to the Constitution of the United States, first, as denying to the plaintiffs in error the equal protection of the laws, in that said statutes allow the condemnation of the property of corporations, while denying the right of condemnation of property owned by persons other than corporations; second, as opposed to the fourteenth amendment of the Constitution of the United States by depriving plaintiffs in error of their property without due process of law; third, as denying adequate right of appeal; fourth, because providing no adequate mode of assessing damages and depriving plaintiffs in error of their property without due process of law; fifth, as being in contravention of common right and violative of the rights of

property guaranteed by the Constitution of the United States; sixth, because perpetrating a fraud upon the United States in authorizing the erection of dams upon great water-courses; seventh, as not affording due process of law, in that the said statutes authorize the taking of private property for a purpose other than a public use.

Plaintiffs in error contend that a Federal question sufficient to give this court jurisdiction is raised by each and all of the seven specifications of error.

> "(1) The validity of the statute of a State or of an authority exercised under a State must be drawn in question. (2) The validity of such statute or authority must be drawn in question upon the ground that they are repugnant to the Constitution, treaties, or laws of the United States. (3) The decision of the State court must be in favor of their validity."
>
> Taylor, Jurisdiction and Procedure of U. S. Supreme Court, paragraph 188, at page 339.

It requires but a simple inspection of the record in this case to ascertain the presence of elements one and three above set out.

The validity of sections 3627 to 3637, inclusive, Code of Alabama, 1907, is drawn into question upon the ground that they are repugnant to the Constitution of the United States. For argument on specifications of error one to seven, inclusive, as raising a Federal question, we respectfully refer the court to the plaintiffs in error's main brief in this case.

Whatever may be the ruling of this court with reference to the first six assignments of error as raising a Federal question, we submit that there can be no doubt that such a question is raised by the seventh assignment, to wit: That sections 3627 to 3637, inclusive, Code of Alabama, 1907, authorize the taking of private property for other than a public use.

Is the sale of power generated by water a public use? This question has never been determined by this court. (See plaintiffs in error's brief, page 67 *et seq.*) This question is clearly a Federal one. The taking of private property for other

than public purposes violates the fourteenth amendment to the Constitution of the United States.

Fallbrook Ir. Dist. *vs.* Bradley, 164 U. S., 112.
Loan Association *vs.* Topeka, 20 Wallace, 655.
Clark *vs.* Nash, 198 U. S., 361.
Strickland *vs.* Highland Boyd Gold Mining Co., 200 U. S., 527.

Mr. Lewis in his authoritative work on Eminent Domain, 3d ed., paragraph 315, says:

> "The fourteenth amendment forbids any State to deprive a person of his property without due process of law. To take property for other than a public purpose, either under the guise of taxation or of eminent domain, is to violate this provision. Hence the purpose of the taking may present a Federal question, though arising under State laws."

It is respectfully submitted that the unconstitutionality of sections 3627 to 3637, inclusive, Code of Alabama, 1907, was properly attacked in the courts below on the ground that the same authorizes the taking of private property for other than a public use; that this contention was directly presented to the Supreme Court of Alabama and passed on by that court in favor of the constitutionality of the statutes.

Plaintiffs in error submit that this court has jurisdiction of this writ of error, as the same was issued to review a final judgment in a suit in the highest court of a State in which a decision in the suit could be had involving proper Federal questions, and that therefore the motion to dismiss should be denied.

Respectfully submitted,

H. N. RANDOLPH,
Atlanta, Ga.,
EDWIN G. BAETJER,
Baltimore, Md.,
Attorneys for Plaintiffs in Error.

3

FILED
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JAMES D. MAHER
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 200.

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY ET AL.,

Plaintiffs in Error,

vs.

ALABAMA INTERSTATE POWER COMPANY,

Defendant in Error.

In Error to the Supreme Court of the State of Alabama.

Brief of Argument for Defendant in Error on Motion to Dismiss.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 200.

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY ET AL.,

Plaintiffs in Error,

vs.

ALABAMA INTERSTATE POWER COMPANY,

Defendant in Error.

In Error to the Supreme Court of the State of Alabama.

Brief of Argument for Defendant in Error on Motion to Dismiss.

The Mount Vernon-Woodberry Cotton Duck Company, the Continental Trust Company, as trustee, the International Trust Company, as trustee, the Tallassee Falls Manufacturing Company and the Consolidated Cotton Duck Company, filed a petition with the Circuit

Judge of the Fifth Judicial Circuit of Alabama praying that a writ of prohibition issue to the Probate Court of Tallapoosa County, Alabama, and to the Judge thereof, restraining and prohibiting the said Probate Court and the Judge thereof from hearing or determining a certain petition or any part thereof or from making any further orders in the proceeding instituted in the said Probate Court by the Alabama Interstate Power Company, in which it sought to condemn certain property of the plaintiffs in error. (Record, pages 1-6.) The Circuit Judge granted the order and prohibited the Probate Court and the Judge thereof as prayed in the petition, and the Power Company was likewise prohibited from engaging in the trial of the case. (R. p. 15.) Thereupon the defendants in the writ appealed to the Supreme Court of Alabama from the order of the Circuit Judge prohibiting the trial of the condemnation proceeding, and executed the necessary bonds to perfect such appeal, under Section 2843 of the Code of Alabama of 1907. (R. p. 18-21.)

On the submission of this appeal in the Supreme Court the judgment or order of the Circuit Judge granting the alternative writ of prohibition was reversed and annulled and an order made dismissing the petition for the writ of prohibition. As the present writ of error is sued out to review that judgment of the Supreme Court we set out the same:

"Come the parties by attorneys, and the record and matters therein assigned for errors being argued and submitted, and duly examined and understood by the Court, it is considered in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the judgment or order of the Judge of said Circuit Court granting the alternative writ of

prohibition in said cause is reversed and annulled, and this Court proceeding to render the judgment or order the Circuit Judge should have rendered, doth order and adjudge that the judgment or order granting the alternative writ of prohibition is vacated and annulled, and that the petition for same be and is dismissed at the cost of the petitioners, for which costs execution may issue. It is also considered that the appellees pay the costs of appeal of this Court and of the Circuit Court." (R. p. 24-5.)

The defendant in error has filed its motion to dismiss the writ of error on the ground in substance that no final judgment is presented to this Court for review within the meaning of Section 237 of the Judicial Code, and that no Federal question is presented.

BRIEF ON THE MOTION TO DISMISS THE WRIT OF ERROR.

The Court is now concerned with the question of its own jurisdiction, which is solely the right to review a final judgment or decree of the Supreme Court of Alabama under Section 237 of the Judicial Code, formerly Section 709 of the Revised Statutes. It is apparent from an examination of the judgment and the opinion of the Supreme Court of Alabama that no such final judgment is presented for review. As pointed out before, the condemnation proceeding was instituted by the Power Company under the laws of Alabama; but *before that proceeding was tried* the defendants therein, who are the plaintiffs in error in this Court, obtained a writ prohibiting the trial upon the theory that the proceeding was not authorized by the laws of the State, or if so authorized that such laws were repugnant to certain provi-

sions of the State and Federal constitutions. Thus it will be seen that the merits and facts of the case were not presented in the Supreme Court for review, but solely the question whether the condemnation petition was sufficient to invoke the jurisdiction of the Probate Court, being the court in the State of Alabama in which such proceedings are required to be initiated. The Court analyzed the statutes of the State and held the same valid against every objection made, and in this language defined the position of the parties at this stage of the case:

> "If upon the hearing of a condemnation proceeding, involving an attempt to condemn an excess the statute describes, the petitioner should fail to meet its obligation to afford the evidential data wherefrom the Court may proceed to judgment in the premises, manifestly there could be no valid condemnation—the statute's conferred right would be vain because of the petitioner's failure to meet its obligation. But, obviously, the statute would not be void. So, in omitting the prescription of method or formula for selecting, individualizing, extracting, or controlling the excess allowed to be appropriated, the statute is not invalid. The manifest legislative expectations that engineering skill would enable the courts to give full effect to the rights conferred by the statute might, in these days of great engineering skill and achievement, and until the contrary is made to appear in a concrete case, be assumed to be entirely justified. Certainly, the courts cannot, at this stage and on these records, adversely declare."—(R. p. 33.)

And further:—

> "The petition for condemnation has been carefully considered by the court. The Statutes (Secs.

3627 et seq.) upon which the right to condemn being constitutionally valid, and authority for proceedings, in the Probate Court, to that end being afforded by Code, Secs. 3860 et seq., no doubt is entertained that the jurisdiction of the Probate Court of Tallapoosa County was invoked by that petition. Its sufficiency as upon motion or demurrer is not considered. Its sufficiency is neither affirmed nor denied. The judicial power to initially hear and determine the question of the freedom of the pleading from amendable defects is in this character of proceeding, alone conferred by law upon the Probate Courts, the jurisdiction of which is invoked. Nor is it proper or necessary that this Court should, at this stage, determine whether every subject of condemnation sought in the petition may be condemned. The Probate Court's jurisdiction to hear and determine having attached, that inquiry will be considered and decided by that court. The statutory system for proceeding under Eminent Domain (Code, Secs. 3860 et seq.) afford ample method and opportunity to contest and have determined every right involved; and to contest every ruling or action of the trial court during the progress of the hearing and leading to its judgment. It cannot be anticipated or presumed that error favorable or unfavorable to any party, will attend the progress of the contest through the Probate Court."—(R. p. 34-5.)

The effect of the judgment of the Supreme Court of Alabama is to leave the trial of the case to proceed in the court of first instance as if there had been no proceeding instituted to delay or prohibit the trial. The merits are yet to be determined. There is no exact judgment to be entered granting or refusing to grant, or condemning or refusing to condemn, the property described

in the petition so that the case falls within the rule laid down in the following cases:

Benjamin v. Dubois, 118 U. S. 46;
Dainese v. Kendall, 119 U. S. 53;
Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91;
Meagher v. Minn. Thresher Mfg. Co., 145 U. S. 608;
Union Mutual Life Ins. Co. v. Kirchoff, 160 U. S. 374;
Great Western Tel. Co. v. Burnham, 162 U. S. 339;
Clark v. Kans. Cy., 172 U. S. 334;
Grant v. Phoenix Mutual Life Ins. Co., 106 U. S. 629;
Moses v. Mobile, 15 Wallace 387;
Loeber v. Shroeder, 149 U. S. 580;
Schlosser v. Hemphill, 198 U. S. 173;
Haseltine v. Central National Bank, 183 U. S. 130;
Mo. & Kan. Int. Ry. Co. v. Olathe, 222 U. S. 185;
La. Nav. Co. v. Oyster Com., 226 U. S. 99.

In Bostwick v. Brinkerhoff, 106 U. S. 3, the Court said:

> "The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would

have nothing to do but to execute the judgment or decree it had already rendered."

And further from the same case:

"If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error . . . This clearly is a judgment of that kind. The highest court of the State has decided that the suit may be maintained in the courts of the State. To that extent, the litigation between the parties has been terminated, so far as the State courts are concerned, but it still remains to decide whether the directors have in fact been guilty of the negligence complained of and, if so, what damages the stockholders have sustained in consequence of their neglect. The Court of Appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit."

In Great Western Tel. Co. v. Burnham, 162 U. S. 339, the Court said:

"The case is open to review by the Supreme Court upon a new appeal, and for that reason was not the final judgment of the highest court of the State in which a decision in the suit could be had."

In the case of Lodge v. Twell, 135 U. S. 232, the Court pointed out that the decree to be final must leave

the case in such condition that if there be an affirmance in this Court, the court below will have nothing to do but to execute the decree. An affirmance of the judgment below could not accomplish this result in the case at bar. As we pointed out before, the Supreme Court held the statutes constitutional and authority for instituting the condemnation proceeding, leaving the ultimate rights of the parties to be worked out through the trial of the case on its merits. Neither an affirmance nor reversal of the judgment of the Supreme Court of Alabama would change the position of the parties, nor can this court say at this stage of the case that any of the rights or property of the plaintiffs in error will be taken without due process of law. Certainly at this time no decree or judgment exists under which the property of the plaintiffs in error may be taken, and this Court cannot anticipate that such results will follow.

But it may be said that the judgment below is final for the purpose of review by this Court when the opinion of the Supreme Court of Alabama is considered, as the right of condemnation was upheld by that Court. A similar contention was made in the case of Louisiana Nav. Co. v. Oyster Com., 226 U. S. 99, in answer to which Mr. Chief Justice White said:

> "In the first place, it is settled that this Court may not be called upon to review by piecemeal the action of a State court which otherwise would be within its jurisdiction, and in the second place, the rule established by the authorities to which we have referred is that, on the question of finality, the form of the judgment is controlling, and hence that this Court cannot, for the purpose of determining whether its reviewing power exists, be called upon to disregard the form of the judgment in order to ascertain whether a judgment which is in form not final

might, by applying the State law, be treated as final in character."

And in Clark v. Kansas City, 172 U. S. 334-338, Mr. Justice McKenna said:

> "The law of the case upon the pleadings, and hence as presented by the demurrer, may be settled, but if power remain to make a new case, either by the direction of the Supreme Court or in the absence of such direction by the statutes of the State, the judgment is not final."

Therefore we submit that there is no final judgment presented for review and that the claim of Federal jurisdiction is so wholly unsubstantial as to be devoid of merit, and the writ of error should therefore be dismissed. (Ennis Water Works v. City of Ennis, 233 U. S. 652; Bowe v. Scott, 233 U. S. 658.)

Respectfully submitted,

THOS. W. MARTIN,

RAY RUSHTON,

Attorneys for Defendant in Error.

FILED
DEC 21 1915
JAMES D. MAHER
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 200.

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY ET AL.,

Plaintiffs in Error,

vs.

ALABAMA INTERSTATE POWER COMPANY,

Defendant in Error.

In Error to the Supreme Court of the State of Alabama.

Motion to Dismiss and Copy of Notice to Opposing Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 200.

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY ET AL.,

Plaintiffs in Error,

vs.

ALABAMA INTERSTATE POWER COMPANY

Defendant in Error.

Now comes the defendant in error and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction because:

First: The judgment or decree from which the writ of error purports to have been taken is not a final judgment in the cause.

Second: The judgment or decree from which the writ of error purports to have been taken is the judgment or decree of the Supreme Court of Alabama reversing and annulling the order of the Judge of the Fifth Judicial

Circuit of Alabama granting the alternative writ of prohibition and dismissing the petition for the writ, which judgment is not the final judgment in the cause.

Third: The judgment or decree from which the writ of error purports to have been taken is the judgment or decree of the Supreme Court of Alabama reversing the order of the Judge of the Fifth Judicial Circuit of Alabama granting an alternative writ which prohibited the trial of a condemnation proceeding pending in a Probate Court of the State of Alabama, and dismissing the said writ of prohibition, and the purpose sought to be accomplished by this writ of error is the review of the questions involved in the aforesaid condemnation proceeding, which by the judgment of the Supreme Court of Alabama should be tried and determined by the said Probate Court on the merits, under the rules of law laid down by the Supreme Court of Alabama in the opinion in the cause, with the right of appeal to either party under the laws of the State, from the judgment of that court; so that manifestly there is no final judgment which may be reviewed in this court.

Fourth: No Federal question is presented by a final judgment on decree of the Supreme Court of Alabama, in such manner as to be now subject to review by this Court.

THOS. W. MARTIN,

RAY RUSHTON,

Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 200.

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY ET AL.,

Plaintiffs in Error,

vs.

ALABAMA INTERSTATE POWER COMPANY,

Defendant in Error.

To Messrs. Venable, Baetjer & Howard and H. N. Randolph, Esq., Counsel for Plaintiffs in Error:

Please take notice that on Monday, the 11th day of January, 1916, at the opening of court, or as soon thereafter as counsel can be heard, a motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of the brief of argument of the defendant in error to be submitted with the said motion in support thereof.

THOS. W. MARTIN,

RAY RUSHTON,

Attorneys for Defendant in Error.

STATE OF ALABAMA,

JEFFERSON COUNTY.

Before the undersigned authority personally appeared Thomas W. Martin, Esq., attorney for the Alabama Interstate Power Company, the defendant in error in the foregoing cause, who being by me first duly sworn deposes and says that on this day he deposited in the post office of the United States in the City of Birmingham, Alabama, copies of the foregoing notice with copy of the motion to dismiss, and of the brief of argument therein referred to and hereto attached, duly post-paid, addressed respectively to Messrs. Venable, Baetjer & Howard, Baltimore, Maryland, and H. N. Randolph, Esq., Atlanta, Georgia, the counsel named therein.

THOS. W. MARTIN.

Sworn to and subscribed before me this the 17th day of December, 1915.

BERNICE SUMMERS,

Notary Public, Jefferson County, Alabama.

(Official Seal.)

FILED
DEC 9 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 200.

MT. VERNON-WOODBERRY COTTON DUCK COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

ALABAMA INTERSTATE POWER COMPANY.

BRIEF FOR PLAINTIFFS IN ERROR.

H. N. RANDOLPH,
EDWIN G. BAETJER,
Attorneys for Plaintiffs in Error.

(24,306)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 200.

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

ALABAMA INTERSTATE POWER COMPANY, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

(1) Statement of the Case.

This was a prohibition case originating in the Circuit Court of Tallapoosa County, State of Alabama.

The petition for rule *nisi* was presented to Honorable S. L. Brewer, judge of said court, and he granted an alternative writ or rule *nisi* thereon on June 21, 1912. The respondent,

In

Alabama Interstate Power Company, thereupon took an appeal to the Supreme Court of Alabama. Subsequently, on December 4, 1913, the latter court passed an order vacating and annulling the alternative writ aforesaid. The opinion was handed down per McClellan, one of the judges of said court (Record, pages 25-36). Thereupon a petition for rehearing was filed in the Supreme Court of Alabama by the Mount Vernon Woodberry Cotton Duck Company and the other plaintiffs. The Supreme Court of Alabama, after taking the same under consideration, passed an order denying a rehearing. Judge Sayre dissented in part, and Judge De Graffenreid dissented absolutely (Record, pages 37-41). A writ of error was then sued out to this honorable court and the same was allowed by Chief Justice John C. Anderson of the Supreme Court of Alabama on the 25th of May, 1914.

The facts, upon which the petition for prohibition was predicated, are as follows: On May 25, 1912, the Alabama Interstate Power Company, a corporation organized and existing under the laws of Maine, filed its petition in the Probate Court of Tallapoosa County against the Tallassee Falls Manufacturing Company, a corporation organized and existing under the laws of the State of Alabama; the Consolidated Cotton Duck Company, a corporation organized and existing under the laws of the State of Delaware; Sigmund Lehman and Philip Lehman, citizens and residents of the city and State of New York; the Continental Trust Company, a corporation organized and existing under the laws of the State of Maryland; the International Trust Company, a corporation organized and existing under the laws of the State of Maryland, and the Mount Vernon Woodberry Cotton Duck Company, a corporation organized and existing under the laws of the State of Delaware. Petitioner alleged in said petition that by its charter it had the right to manufacture, supply, and sell to the public, power produced by water as a motive force, including the right to construct a dam and works necessary, incident and related thereto; to

impound water therein and to build all necessary power-houses, and install necessary machinery. It was alleged that it had acquired by purchase a dam or power site comprising not less than one acre of land upon each and opposite sides of the Tallapoosa River in section 36, township 20, range 21, and lying in the counties of Tallapoosa and Elmore, in the State of Alabama; the said Tallapoosa River being a non-navigable water-course. Petitioner alleged further that the defendants owned and operated two cotton factories in the northeast quarter of section 19, township 18 north, range 22 east, in Tallapoosa and Elmore countries, State of Alabama, one located in Elmore County, the other in Tallapoosa County; that in connection with the same the said defendants had theretofore erected a dam across said Tallapoosa River, together with hydraulic structures, by means of which they generated a limited amount of power, greatly less than the capacity of said river, said cotton factories being operated by the power thus produced. The petitioner alleged that because of the construction of the dam which petitioners proposed to erect, the water of said Tallapoosa River would be greatly increased at certain seasons of the year, and therefore, the power produced by the defendants at their dam would be largely increased above and beyond what they were actually using, or which they could use at normal stages of said river.

Upon these allegations petitioner sought to condemn an opening two hundred feet wide in the middle of the dam, owned and used by the defendants in the operation of the factories aforesaid, and by some means to introduce the water from the opening into a power-house to be erected just below the defendants' dam, on 3.7 acres of land, which it by the petition also sought to condemn.

Petitioner furthermore sought to condemn for the joint use of petitioner and defendants a spur railroad which it was alleged the Tallassee Falls Manufacturing Company, one of the defendants, had previously built, extending from

the depot in the town of Tallassee across a bridge on the Tallapoosa River, and thence to the doors of its two factories; and likewise to condemn a strip of land one hundred feet wide, from one of the factories to the proposed power-house, along which petitioner alleged, it proposed to extend said spur track (Record, pages 9 and 10). Certain other rights, dependent upon the main right to utilize the water from the opening in the Tallassee Falls Manufacturing Company's dam through the proposed power-house were also sought. It was then alleged that "petitioner seeks to acquire the lands, easements, hydraulic structures, water and water rights described in this application, to be used by it in the manufacture, supply, and sale to the public of power produced by water as a motive force the better to enable it to perform its duty to the public as a public-service corporation; and your petitioner does now expressly recognize the duty and obligation to the public imposed upon it by the laws of Alabama to manufacture, supply, and sell to the public, electric current which *will be* produced by it by means of the use of the properties sought herein to be acquired by it" (Record, page 11).

The petition prayed that the above-named corporations and persons be made parties defendant, and concluded with a prayer for an order or judgment of condemnation. Upon this petition Judge J. G. Sorrell, judge of the probate court of Tallapoosa County, on May 25, 1912, passed an order taking jurisdiction of said application and setting the 24th day of June following as a time for the hearing thereof. The Mount Vernon Woodberry Cotton Duck Company and the other parties defendant being advised by counsel that the proceeding for condemnation as aforesaid was irregular, illegal, and void, and being further advised that the probate court of Tallapoosa County was without jurisdiction to entertain any such proceeding, instituted by petition the proceedings for prohibition above first mentioned and described. No hearing has ever been had in the probate court upon the petition for condemnation because

of the filing of the petition for prohibition and the subsequent appeals had thereon.

From the foregoing it will appear that the plaintiff, Alabama Interstate Power Company, has never at any time built any dam at its alleged power or dam site, and the sole predicate for the entire proceeding was its averment that it owned land, "not less than an acre in extent," on both sides of said Tallapoosa River at said power dam site. The dam and power plant of the defendant corporation are located down-stream from this alleged power site of the plaintiff, Alabama Interstate Power Company, and the intervening distance between the two power plants (assuming that the plaintiff will ever construct its own, as a matter of fact), is not less than ten miles (Petition, paragraph 12; Record, page 3). It was charged in the petition for prohibition that the plaintiff, Alabama Interstate Power Company, was basing its claim of right to condemn the property sought under sections 3627-3637 of the Code of 1907 of the State of Alabama, and its right to proceed under said sections was attacked upon various grounds which are set forth in the petition (Record, pages 1-6). It was contended in the petition for prohibition that the law as set forth in these sections of said code, if capable of the construction placed upon them by the plaintiff, Alabama Interstate Power Company, contravened numerous provisions of the Constitutions of the State of Alabama and of the United States. The court's attention is specifically directed to the allegations of said petition.

Specification of Errors.

1. Said Supreme Court of Alabama erred in reversing the action of the judge of the fifth judicial circuit of the State of Alabama in granting an alternative writ of prohibition or rule *nisi* on the petition for prohibition, and in dismissing and holding for naught said petition, for

this, that the statutes of Alabama under which the right of condemnation was claimed, to wit, sections 3627-3637 of the Code of Alabama (said sections are hereinafter set forth at length), are (if they be held to confer the right of condemnation claimed) unconstitutional and void as opposed to the Fourteenth Amendment to the Constitution of the United States, the protection of which was claimed and invoked in said petition for prohibition, in that said statutes deny the Mount Vernon Woodberry Cotton Duck Company and the other plaintiffs in said petition for prohibition the equal protection of the laws by authorizing the condemnation of said property and property rights when they are owned by a corporation and withholding such condemnation when said property is owned by persons other than a corporation.

2. Said Supreme Court of Alabama erred in reversing the action of the judge aforesaid in granting an alternative writ of prohibition or rule *nisi*, for this, that the statutes of Alabama under which the right of condemnation was claimed, to wit, sections 3627-3637 of the Code of Alabama are (if they be held to confer the right of condemnation claimed) unconstitutional and void as opposed to the Fourteenth Amendment of the Constitution of the United States, the protection of which was claimed and invoked in said petition, in that such condemnation will deprive said Mount Vernon Woodberry Cotton Duck Company and the other parties plaintiff to said petition of their property without due process of law.

3. Said Supreme Court of Alabama erred in reversing the action of the judge aforesaid in granting an alternative writ of prohibition or rule *nisi* and in dismissing and holding for naught said petition, for this, that the statutes of Alabama under which the right of condemnation was claimed, to wit, sections 3627-3637 of the Code of Alabama, are (if they be held to confer the right of condemnation

claimed) unconstitutional and void as opposed to the Fourteenth Amendment of the Constitution of the United States, the protection of which was claimed and invoked in said petition, in that they deny the defendants to said condemnation proceedings any such right of appeal prior to the assessment of damages as will stay any such assessment and as will enable said defendants to revise the judgment of the probate court granting the prayer of said petition.

4. Said sections 3627-3637 of the Code of Alabama provide no mode of assessing the damages; nor do the eminent-domain statutes set forth in the Code of Alabama of 1907, chapter 79, section 3860 *et seq.*, referred to and adopted in section 3637 of said Code (said sections are hereinafter set forth at length), provide an adequate mode of assessing such damages; and said sections are unconstitutional and void for this, that said statutes deprive the Mount Vernon-Woodberry Cotton Duck Company and the other parties plaintiff to the prohibition suit of due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, the protection of which was specifically claimed and invoked in said petition for prohibition.

5. Said statutes, Code of Alabama of 1907, sections 3627-3637, under the construction placed upon them in said final decision of the Supreme Court of Alabama, are against common right, and are therefore violative of the rights of property guaranteed by the Constitution of the United States.

6. Said statutes authorizing said condemnation are void, in that they are a fraud upon the State of Alabama and upon the United States, in that they authorize the erection of dams upon great water-courses in the State of Alabama without the consent of the United States and without compensation either to the State of Alabama or to the United States.

7. Said petition for condemnation is insufficient to confer jurisdiction upon the probate court aforesaid and does not afford due process of law, in that the purposes sought to be accomplished and subserved by said petition, to wit, the sale of power generated by water, is not a public purpose or use.

ARGUMENT.

Sections 3627-3637 of the Code of 1907 of the State of Alabama, the constitutionality of which is herein brought in question, are as follows:

> "All corporations organized under the general laws of this State or heretofore under a special act of the legislature, and all corporations organized under the laws of any of the other of the United States, and which have complied with the constitution and laws of the State of Alabama as to foreign corporations, and which by their charter have the right to manufacture, supply, and sell to the public, power produced by water as a motive force, shall, after acquiring by purchase or otherwise than by condemnation, a dam site or power site comprising not less than one acre of land upon each and opposite sides of any water-course, in addition to other powers conferred by law, have the following rights, powers, and authority:
>
> "To acquire by condemnation the lands and rights necessary for the construction and operation of said dam, and works connected therewith or useful thereto, either up or down stream therefrom, and (in the case of non-navigable streams) to construct and operate at said site, or other points up or down the stream therefrom, and across said stream, a dam, together with all works incident, necessary or related thereto, and in connection therewith to impound or divert water of any water-course or water-courses of this State, and to raise higher such dam and to enlarge the works necessary, related or incident thereto, and to construct other works necessary, incident or related thereto, either up stream or down stream

therefrom, as may be required or deemed expedient by such corporation, in the manufacture and supply of power produced by water as a motive force.

"To acquire by condemnation all lands or waters or interests or rights or easements in lands or waters likely or liable to be flooded or damaged by impounding or diverting the water of any water-course in this State, or its tributaries, or necessary for the construction or operation of dams or power-houses, or works necessary, incident, or related thereto, or likely or liable to be flooded or damaged by the construction or operation or enlargement of the dams or works incident, necessary or related thereto or damaged or taken in the construction, operation, or use of canals, tail-races, or exit ways necessary, useful, or convenient for the escape, conveyance or return of the water used in the operation of the works or power plants.

"To acquire by condemnation the necessary lands for substations and transmission lands, but shall have no right to condemn a private residence nor the outhouses, garden, nor orchard within the curtilage of a private residence, for a substation site or for rights of way for its transmission line or lines. Such corporations shall have no right to condemn lands, water, or water rights in use for power purposes by another corporation upon the same water-course, having similar powers and essential to its operations; or lands, water, or water rights held by such other corporation for power purposes where the lands, water, or rights in themselves and taken alone or in connection with other lands, water, or rights owned by such other corporation, can be made the reasonable basis of a water-power development of at least one thousand continuous horse-power; but may condemn lands, hydraulic structure, water, or water rights held by such other corporation at any point upon the same water-course, unless the lands, structures, or rights in themselves and taken alone or in connection with other lands or rights owned by such other corporation can be made the reasonable basis of a water-power development of at least five hundred continuous horse-power, and may condemn lands, hydraulic structures, water, or water rights of such

other corporation, at any point upon the same water-course, in excess of such other corporation's actual facilities for using the same (independently of the actual or proposed works of the condemning party) for the manufacture of power by its plant as the same is already established at the time the condemnation proceeding is begun, provided the plant of such other corporation has been in operation for five years or more preceding the commencement of the condemnation proceedings. Nor shall such corporation have the right to condemn the lands, hydraulic structures, water, or water rights of any cotton factory, at any point upon the same water-course, in actual and prior use by it for the operation of its plant; but may condemn the lands, hydraulic structures, water, or water rights of such cotton factory in excess of what is actually in use, or may be used at normal stages of the stream, for the operation of its plant as already established at the time the condemnation proceeding is commenced. Such corporation may by a condemnation acquire the right to flood grist mills and industries in conjunction therewith, together with lands and water rights appertaining thereto. In all cases just compensation shall first be paid to the owner in the manner provided by law for all property taken.

"SECTION 3636. Any corporation which exercises any of the rights conferred by this article, shall, after the completion of its works and plants, be under the duty and obligation to the public to manufacture and sell to the public, electric current produced at its plants, and any corporation manufacturing, selling, and supplying power, heat, light, or electricity produced by water as a motive force under the provisions of this article, must sell such power, heat, light, or electricty to any person or persons, municipal or other corporations, in the order in which requests or demands are made for such light, heat, power, or electricity. Nothing herein, however, shall be construed to require any such corporation to furnish light, heat, power, or electricity to any person or persons, corporation or corporations, until satisfied of his or its financial responsibility. And except in conformity with its reasonable rules and regulations and

reasonable prices for the same, and except as far as the capacity of its plant will permit.

"SECTION 3637. The procedure for condemnation under this article shall be in the manner provided for the condemnation of lands and rights of way for public use, in article one (1), chapter 79 (42), of the Code; or, at the option of the condemning party, in the manner provided in any other statute conferring the power of eminent domain on public-utility corporations."

(Civil Code of Alabama, vol. 2).

The original act of which the aforesaid sections of the Code purport to be a codification (in part) was approved October 1, 1903 (see Acts of Alabama, 1903, pages 365-369). The pertinent parts of said act are as follows:

"SECTION 1. *Be it enacted by the legislature of Alabama,* That all corporations organized under the general laws of this State or heretofore under a special act of the legislature of this State, and all corporations organized under the laws of any other of the United States and which have complied with the constitution and laws of the State of Alabama as to foreign corporations, and which by their charter have the right to manufacture, supply and sell power produced by water as a motive force, shall, after acquiring by purchase, or otherwise than by condemnation, a dam or power site comprising not less than one acre of land upon each and opposite sides of any water-course (not a navigable stream), have the right and authority to construct and operate thereon and across said stream a dam, together with all works incident or necessary thereto, and the right and authority to raise higher such dam and to enlarge the works necessary or incident thereto, as may be required or deemed expedient by said corporation, in the manufacture and supply of power produced by water as a motive force: *Provided,* That where the owner of one bank of a navigable stream has authority from the United States to dam such stream, said owner may by a condemnation acquire land on the opposite bank for the construction of said dam.

"SECTION 2. That corporations such as are mentioned in section one hereof shall have the right and authority to acquire by purchase, if said corporation and the owners agree, and if said corporations and said owners cannot agree as to said purchase, then by a condemnation in the manner provided by law for the condemnation of lands, all lands or waters or interests or rights or easements in lands or waters likely or liable to be flooded or damaged by the construction and operation and enlargement of the dam and works incident or necessary thereto, provided, such corporation shall have no right to condemn a private residence nor the outhouses, garden nor orchard within the curtilage of a private residence; and provided such corporation shall have no right to condemn lands or water rights in use or held for such use by another corporation having similar powers and, provided, such corporations shall have no right to condemn water rights in actual and prior use by any cotton mill or factory; but such corporations may, by condemnation, acquire the right to flood grist mills and industries in conjunction therewith, together with lands and water rights appertaining thereto, but must pay to the owner thereof, before such flooding, such reasonable and just compensation as may be awarded in the manner provided by law for the condemnation of lands."

The act of 1903 above set forth was amended by an act approved March 12, 1907 (see Acts Alabama, 1907, pages 439-442). The pertinent parts of this act are as follows:

"SECTION 1. *Be it enacted by the legislature of Alabama*, That section 1 of an act entitled 'An act to confer additional rights and powers, including the right to acquire by purchase or by condemnation, lands and easements, upon corporations organized under the general laws or heretofore under a special act of the General Assembly of the State of Alabama, and upon corporations organized under the laws of any other State of the United States, and which corporations have complied with the laws of Alabama in reference to foreign corporations and which have the

right by their charter to manufacture, supply, and sell power produced by water as a motive force,' approved October 1, 1903, be amended so as to read as follows: Section 1. That all corporations organized under the general laws of this State or heretofore under a special act of the legislature of this State, and all corporations organized under the laws of any other of the United States, and which have complied with the constitution and laws of the State of Alabama as to foreign corporations, and which by their charter have the right to manufacture, supply and sell to the public, power produced by water as a motive force, shall after acquiring by purchase or otherwise than by condemnation a dam or power site comprising not less than one acre of land upon each and opposite sides of any water course, have the right and authority to acquire by condemnation in the manner provided by law for the condemnation of lands and rights of way for public use in article one (1), chapter 42 of the code the lands necessary for the construction and operation of said dam, and works therewith, and the right and authority to construct and operate at said site and across said stream a dam, together with all works incident or necessary thereto, and the right and authority to impound or divert water of any water-course or water-courses of this State, and the right and authority to raise higher such dam and to enlarge the works necessary or incident thereto, as may be required or deemed expedient by such corporation in the manufacture and supply of power produced by water as a motive force.

"SECTION 2. That section 2 of this act be amended so as to read as follows: Section 2. That corporations such as are mentioned in section one hereof shall have the right and authority to acquire by purchase, if said corporations and the owners agree, and if said corporations and said owners cannot agree as to said purchase, then by condemnation in the manner provided by law for the condemnation of lands and rights of way for public use in article one (1), chapter 42 of the code of 1896, which method of condemnation shall be cumulative, all lands or waters or interests or rights or easements in lands or waters,

likely or liable to be flooded or damaged by impounding or diverting the water of any water-course of this State, and its tributaries or necessary for the construction of dams and power-houses or works necessary or incident thereto, or likely or liable to be flooded or damaged by the construction and operation and enlargement of the dams and works incident or necessary thereto, or damaged or taken in the construction, operation, or use of all canals, tail-races, or exit ways necessary, useful or convenient for the escape, conveyance or return of the water used in the operation of the works or power plant; provided, that such corporation shall have no right to condemn a private residence, nor the outhouses, garden, nor orchard within the curtilage of a private residence, for rights of way for its transmission line or lines; and provided, such corporation shall have no right to condemn lands or water rights in use or held for such use by another corporation having similar powers, except where such lands or water rights have been acquired subsequently to those already held by the condemning party upon the same river or stream, and where the lands or rights acquired by such other corporation prior to the holdings of the condemning party in themselves and taken alone cannot be made the reasonable basis of a water-power development, or where and to the extent that such water rights cannot be utilized beyond the average natural flow of the stream as determined by the records of previous years except by virtue of the works or constructions of the condemning party; and provided, such corporations shall have no right to condemn water rights or water in actual and prior use by any cotton mill or factory, or other industry using water power, provided this restriction does not apply to waters in actual use or capable of being used by the said cotton manufacturers, or other industry using water power, for the use of its plants already established as the same may be available to it by the actual flow of the stream or by its facilities for increasing the same; but such corporation may by condemnation acquire the right to flood grist mills and industries in conjunction therewith together with lands and water rights appertaining thereto, but must pay to the

owner thereof before such flooding such reasonable and just compensation as may be awarded in the manner provided by law for the condemnation of lands and rights of way for public use in article one (1) of chapter 42 of the code of 1896.

"SECTION 3. That said act be amended by adding thereto after section eight, the following: Section 8½. That any dam erected in accordance with the provisions of this statute, shall be considered a dam authorized by the legislature of this State at the particular site selected and of the specific height and dimensions determined upon.

"SECTION 4. That said act be amended by adding thereto after section 9, the following: Section 9½. *Be it further enacted.* That any corporation manufacturing, selling, and supplying power, heat, light or electricity produced by water as a motive force under the provisions of this statute must sell such power, heat, light, or electricity to any person or persons, municipal or other corporation, in the order in which requests or demands are made for such light, heat, power, or electricity. Nothing herein, however, shall be construed to require any such corporation to furnish light, heat, power, or electricity to any person or persons, corporation or corporations, until satisfied of his or its financial responsibility, or until adequate security has been given for the performance of any contract to be entered into."

(Approved March 12, 1907).

We have set forth these acts in order specifically to call the court's attention to the fact that neither in the original act of 1903, or in the amendment of 1907, did the words "up or down the stream thereform" appear. We will point out in detail hereafter that these words did not appear in the law of Alabama as written until the adoption of the Code of 1907.

That part of the constitution of 1901 of the State of Alabama declaring under what circumstances the right of eminent domain may be exercised, is to be found in section 23 of said constitution, which is as follows:

"That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association."

The procedure provided by the Code of 1907 of the State of Alabama whereby the rights of eminent domain in the proper cases may be exercised and which is referred to in sections 3627-3637 of said code, will be found in sections 3860-3887 of said Code (Vol. 2, Code of 1907, State of Alabama, pages 577-586). The relevant parts of said sections are as follows:

"3680. Any county, municipality or corporation organized under the laws of this State, or any person, or association of persons, proposing to take lands, or to acquire an interest, or easement therein, for any uses for which private property may be taken, may, if there be no other mode of proceeding prescribed by law, apply to the court of probate of the county in which such lands, or a material portion thereof, may be situate, for an order of condemnation thereof to such uses.

"3861. The application must be in writing, veri-

fied by the oath of the applicant, or by the oath of an agent or attorney, and accompanied with security for the costs, and must state with certainty the name and residence of the applicant, the uses or purposes for which the land is to be taken, and the interest or easement therein to be acquired. Where there are several tracts of land lying within one county of which portions are proposed to be taken or in which an interest or easement is proposed to be acquired, the applicant may join them all in separate paragraphs in the same application, and must describe the several tracts and state the names and residence of the owners of each tract, if known, or if unknown, must show that reasonable diligence has been used to ascertain the same.

"3862. On the filing of the application the court must make and enter an order appointing a day for the hearing thereof; and must issue to all the owners of such lands as reside in the State, notice of the application and of the day for the hearing thereof, which must be served by the sheriff or other legal officer at least ten days before the day appointed for the hearing; if any of the owners be unknown, or if they reside out of the State, notice to them must be given by advertisement in some newspaper published in the county, or, if there be no newspaper published in the county, by posting notice at the court-house door and three other public places for at least three weeks before the day appointed for the hearing. If any of the owners be infants or persons of unsound mind, notice must be served on their guardian if they have any resident in the State, but if they reside in the State and have no such guardian, then upon the persons who have them in charge, or with whom they reside. If any of the owners be dead and the lands are in the possession or under the control of the personal representatives of such deceased owners, notice must be served on such representatives and on the heirs at law of the decedents.

"3863. If the owner of the lands be an infant, or is of unsound mind, the court, on the day appointed for the hearing, must appoint a guardian *ad litem* to represent him; and the guardian so appointed must file a written acceptance of the appointment, must appear

and protect the rights and interests of such infant, or person of unsound mind; and, if he deems it necessary, may employ counsel to assist him; the compensation of such guardian and of his counsel must be ascertained by the court and taxed as costs of the proceeding.

"3864. If the owner does not appear on the hearing of the application, the court must hear the same, and if the application be granted, must appoint commissioners as herein provided for, and thereafter the same proceedings shall be had as if such owner had appeared.

"3865. On the day appointed, or any other day to which the hearing may be continued, the court must hear the allegations of the application, and any objections which may be filed to the granting thereof, and any legal evidence touching the same, and shall make an order granting or refusing the application.

"3866. If there are several distinct tracts of land owned by different persons embraced in the application, the owners of each tract may have a separate hearing as to the right to condemn their lands, and the court may, if it finds that the application should be granted as to some and not as to other of the owners, make and enter its decree accordingly.

"3867. If the property sought to be condemned, or any portion thereof, or interest therein, has already been subjected or devoted to a public use, such land or portion thereof, or interest therein, shall not be taken for another and different character of public use unless an actual necessity for the specific land or portion thereof or interest therein shall be alleged and proven, and unless it be alleged and proven that such other and different character of public use will not materially interfere with the public use to which such property is already subjected or devoted.

"3868. The hearing herein provided must in all respects be conducted and evidence taken as in civil cases at law.

"3869. If the application be granted, in whole or in part, the judge of probate must appoint three citizens of the county in which the lands sought to be condemned are situated, who shall possess the quali-

fications of jurors, who shall be disinterested, and who shall file a certificate along with their award that neither of them had ever been consulted, advised with, or approached by any person in reference to the value of the lands, or the proceedings to condemn the same prior to the assessment of damages, and that they knew nothing of the same prior to their appointment; and the judge of probate is authorized to fill any vacancy occasioned by death, failure to act, or any disqualification of any such commissioners from interest, prior knowledge of the subject-matter, or being consulted with, advised with, or approached in reference to the condemnation of such lands, prior to appointment or assessment of the damages.

"3870. When the court shall have appointed the commissioners as herein provided, it shall at once issue a notice of the appointment to the sheriff, who shall serve such notice upon the person designated therein within five days of the receipt thereof, and the sheriff shall receive the same compensation for serving such notice as allowed for summoning jurors.

"3871. The commissioners thus appointed, or a majority of them, shall assess separately the damages and compensation to which the several owners of each of the several tracts of land are entitled, and they shall be sworn as jurors are sworn. The commissioners may view the lands to be subjected, and must receive all legal evidence offered by any touching the amount of damages the owners of the lands will sustain and the amount of compensation they are entitled to receive.

"3872. The amount of compensation to which the owners are entitled must not be reduced or diminished because of any incidental benefits which may accrue to them, or to their remaining lands in consequence of the uses to which the lands to be taken, or in which an easement is to be acquired, will be appropriated. Declaratory only.

"3873. Any person interested in the proceedings may be present in person or by attorney at any of the proceedings or trials provided for in this article.

"3874. The commissioners must, within twenty

days from their appointment, make a report in writing to the court, stating the amount of damages and compensation ascertained and assessed by them for the owners of each tract of land or persons injured, and thereupon the court must order the same to be recorded, and must make orders of condemnation in pursuance thereof upon the payment of the damages and compensation so assessed and reported or the deposit of the same in court.

"3875. Any of the parties may appeal from the order of condemnation to the circuit or city court of the county within thirty days after the making of the order of condemnation, by filing in the court rendering the judgment, a written notice of appeal, a copy of which shall be served on the opposite party, or his attorney, and on such appeal the trial shall be *de novo*, and it shall be necessary to send up the proceedings only as to the parties appearing or against whom an appeal is taken.

"3876. No appeal shall suspend the judgment, or deprive the applicant of the right of entry, provided the amount of the damage assessed for the parties who appeal, or against whom an appeal is taken, shall have been paid into court in money and a bond shall have been given in double the amount of such damage, with good and sufficient sureties, to pay such damages as the property owners may sustain.

"3877. In case more than one land owner appeals, or appeal is taken against more than one, there shall be separate bonds given, as above provided, to each one so appealing or appealed against.

"3878. If the probate court refuses to grant the application the applicant shall have a right of appeal to the like court upon giving security for costs, to be approved by the judge of probate, and upon such appeal the trial shall be *de novo*. Upon any appeal taken to the circuit court or court of like jurisdiction under this section, if such court determines that the application should be granted, it shall proceed forthwith to have the damages and compensation assessed by a jury.

"3879. Upon the payment to the owner of the damages so assessed, and the payment of costs of suit into court, or upon the payment of the damages and

costs of suit into court, the court shall make an order of condemnation in accordance with the application upon the trial in the court to which the appeal is taken.

"3880. Either party may, by bill of exceptions, reserve any ruling or decision of the court as in other cases.

"3881. After final judgment in the circuit court or court of like jurisdiction, any party may, within thirty days thereafter, upon giving bond or security for costs, as in other cases, appeal to the Supreme Court.

"3882. The order of condemnation upon the payment of the sum ascertained and assessed by the verdict of the jury, or the deposit thereof in court for the defendant, shall vest in the applicant the easement proposed to be acquired for the uses and purposes stated in the application, and for no other uses or purposes. But if an appeal shall be taken by either party, then the person, corporation, or association seeking to acquire such right of way, upon the deposit in the court, for the party whose land is sought to be condemned, of the amount of damages and compensation so assessed, together with the costs of the proceeding, shall be entitled to enter upon the lands so condemned, and survey, construct, and operate on the same for the uses and purposes stated in the application; but such easement shall not vest absolutely in such person, corporation, or association until the final determination of the cause and the payment or deposit in court of such damages and compensation as shall then be adjudged.

"3883. The applicant may pay the damages and compensation assessed at any time within six months after the assessment thereof, or, in case an appeal is taken, within six months after the appeal is determined; but if he fails to pay the same within such time, such assessment shall cease to be binding on the owner of the lands, and the rights of the applicant thereunder shall determine; and, upon such failure, the applicant shall be liable to the owner for all damages the latter may have sustained by the institution of such proceedings, including a reasonable attorney's fee for defending the same.

"3884. A telegraph or telephone company, incorporated under the laws of another State, proposing to extend connecting lines into this State, may acquire an easement for the uses and purposes of such connecting lines, and may pursue the mode of proceeding prescribed in this article.

"3885. Any corporation, person, or association of persons owning a railroad or street railroad in this State and proposing to cross or intersect the line of another railroad or street railroad, may acquire an easement for such purpose, and to that end may pursue the mode of proceeding prescribed in this article.

"3886. The costs of the application and proceedings thereunder, including the compensation of commissioners, who shall receive the pay of jurors, must be adjudged and assessed against the applicant and his surety for costs, for which execution may issue. But should the applicant tender to the land-owner, prior to the application for condemnation, a sum of money in excess of that awarded by the commissioners, which tender he has kept good until the time of trial by paying the same into court to await the result of the proceeding, in which case the costs of the proceeding shall be taxed against the land-owner; but the commissioners awarding damages shall have no knowledge of the amount so tendered, and shall so certify in their award.

"3887. The court of probate must be deemed always open for the filing and trial of all applications made under this article."

We call the court's attention at this point to the fact that under the Code of 1896 of the State of Alabama, section 1717, the law provided that a day should be set apart for the hearing of the petition for condemnation, and that on that day, after notice, the court should hear the evidence and determine whether the complainant was entitled to relief, and should make an order or decree granting or refusing the application, and an appeal was given from the judgment so rendered. This section 1717 of the Code of 1896 is as follows:

"1717. Allegations, Objections, and Proof to be Heard—Appeal.—On the day appointed, or any other day to which the hearing may be continued, the court must hear the allegations of the application and any objections which may be filed to the granting thereof, and any legal evidence touching the same, and shall make an order granting or refusing the application. The hearing herein provided must in all respects be conducted and evidence taken as in civil cases at law, and either party may, by bill of exception, reserve any opinion or decision of the court as in cases in which bills of exception are allowed in civil cases at law; and either party is entitled to an appeal to the Supreme Court from the order of the court granting or refusing the application, within thirty days from the making thereof."

Section 2665 (*supra*) of the Code of 1907 of the State of Alabama purports to be a codification of section 1717 (*supra*) of the Code of 1896, but, as the court will perceive, the right of appeal from the preliminary order of condemnation was omitted in section 2665 of the Code of 1907, and the only right of appeal now granted in such proceedings is by section 3875 (*supra*) of said Code. This omission of the Code of 1907 of the right of appeal from the preliminary order of condemnation introduced a change of the greatest importance in the law, to which we will call specific attention hereafter.

There are some preliminary questions in this case to which we will address ourselves before passing to the argument and discussion of the constitutional or Federal questions involved.

Prohibition the Proper Remedy.

The extraordinary writ of prohibition will lie to restrain the unlawful exercise of judicial functions by an inferior tribunal (Cyclopedia of Law and Procedure, vol. 32, page 600, and note 12).

The writ will lie in all cases either of abuse or usurpation of jurisdiction by an inferior tribunal (*Idem,* 604, note 32).

The writ will lie if the inferior tribunal is assuming to act when it has no jurisdiction of the subject-matter of the proceedings (*Idem,* page 605, note 39).

And finally, where jurisdiction is conferred or proceedings instituted under unconstitutional acts or ordinances, prohibition will lie (*Idem,* 606, notes 45 and 46).

In Ex parte State *ex Rel.* Attorney General, 150 Ala., page 489, the court said:

> "It is entirely true that prohibition is an extraordinary legal remedy and can only be resorted to in cases of usurpation of jurisdiction or power by an inferior court, or when in the exercise of jurisdictions in handling matters clearly within its cognizance the inferior court transgress the bounds prescribed to it by law. * * * It is also true that this remedy cannot be resorted to when an appeal will not lie for the correction of errors committed upon the hearing of a cause. But if the want of jurisdiction is disclosed on the face of the petition, then a writ of prohibition will be awarded notwithstanding the respondent may have jurisdiction to issue the writ of *habeas corpus* in proper cases" (*Ex parte* Walker, 25 Ala., 81; *Ex parte* Smith, 23 Ala., 94)."

In other words, when it clearly appears that the inferior court has no jurisdiction of the subject-matter or of parties to the legal controversy, a writ of prohibition is the remedy (16 Enc. of Pl. and Pr., 1110).

In *Ex parte* Roundtree, 51 Ala., page 42, the 5th headnote is as follows:

> "This court will interfere by prohibition to restrain a circuit judge from sitting as the presiding judge of a statutory inferior court when the act creating that court and making him the presiding judge thereof is declared unconstitutional."

It becomes necessary, therefore, at this point to discuss the jurisdiction of the probate court of Alabama. Article 6 of the constitution of 1901, relating to the judicial department, provides in section 139 that "The judicial power of the State shall be vested in the Senate sitting as a court of impeachment, and the Supreme Court, the circuit courts, chancery court, and courts of probate, et cetera." In section 140 it is declared that the Supreme Court, except as otherwise directed in the constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, and section 143 provides:

> "The circuit court shall have original jurisdiction in all matters civil and criminal within the State not otherwise excepted in this constitution, but in civil cases other than suits for libel, slander, et cetera, it shall have no original jurisdiction except where the matter or sum in controversy exceeds fifty dollars."

Section 145 provides:

> "The legislature shall have power to establish a court or courts of chancery with original and appellate jurisdiction, except as otherwise authorized in this article."

Section 148 provides:

> "The legislature may confer upon the circuit court or the chancery court the jurisdiction of both courts."

Section 149 provides:

> "The legislature shall have power to establish in each county a court of probate with general jurisdiction of orphans' business *and with powers to grant letters testamentary and of administration: Provided,* That, whenever any court having equity powers has taken jurisdiction of the settlement of any estate, it shall have power to do all things necessary for the settlement of such estate, including the ap-

pointment and removal of administrators, executors, guardians, trustees, and including action on the resignation of either of them."

Section 150 provides:

"The justice of the Supreme Court, chancellors, and the judges of the circuit courts and other courts of record, except probate courts, shall at stated times receive for their services a compensation which shall not be diminished during their official terms, et cetera."

Section 154 provides:

"Chancellors and judges of all courts of record shall have been citizens of the United States and of this State for five years next preceding their election or appointment, and shall not be less than twenty-five years of age, and *except judges of the probate court,* shall be learned in law."

Section 171 provides:

"The legislature shall have the power to abolish any court except the Supreme Court and the probate court whenever its jurisdiction and functions have been conferred upon some other court."

There is thus in the judiciary articles of the constitution of 1901 an enumeration of the several courts of the State of Alabama and of their general powers and jurisdiction which must be deemed controlling, upon elementary principles, over all legislation relating to those courts; each is accorded exclusive powers and jurisdictions; each within the area of these powers is supreme.

The circuit court has original jurisdiction in all matters civil and criminal. The Supreme Court has exclusive appellate jurisdiction. The court of chancery has such original and appellate jurisdiction as pertains to equity. While the probate court is to have general jurisdiction of orphans' business, with powers to grant letters testamentary and of

administration, there is no further grant of power to that court. It is limited to the jurisdiction expressly conferred by section 149 (*supra*) of the constitution. That its powers should not increase beyond those expressly specified is indicated by the fact that judges of that court are not required to be learned in the law and are not to receive a fixed compensation (sections 150 and 154). There is nothing whatever in the constitution of Alabama which gives to the court of probate jurisdiction over condemnation proceedings. These proceedings come within the general grant of jurisdiction which is vested expressly in the circuit court by section 143 (*supra*), and an attempt, therefore, to take from the circuit court the jurisdiction which the constitution vests in it and to give it to the probate court, which is created as a court of limited jurisdiction, is in direct violation of the terms of the constitution.

In De Hart *vs.* Hatch, 3 Hun., 375, the same questions arose under the constitution of New York which conferred upon the Supreme Court (Supreme Court of New York corresponds to the Circuit Court of Alabama) general jurisdiction in law and equity. It was held that the legislature had no power to abridge or limit said jurisdiction either with or without the consent of that court, and that, consequently, the act which provided that any of the courts therein named, including the Supreme Court, might by an order to be entered on its minutes after the joinder at issue, transfer actions pending therein of the classes therein specified to the marine court for trial, was unconstitutional and void. It was also stated that either party to the action in the Supreme Court was entitled to have the case tried in and determined by that court, and that such right could not be taken away either by the legislature or the court without his consent. The opinion of Mr. Justice Daniels in that case was well reasoned, and has been frequently quoted, and is applicable to the provision of the Alabama constitution above quoted.

The Court of Appeals of New York, in People *ex Rel.*

Mayor, etc., of New York *vs.* Nichols, 79 N. Y., page 582, followed the case just cited, Mr. Justice Danforth saying:

> "It is provided by the constitution that a court itself shall have general jurisdiction in law and equity. It follows that its jurisdiction can be limited neither by the legislature nor by any power conferred by it upon the court itself. Its functions are to be exercised by its judges sitting in general term, or at the circuit, or oyer and terminer or special terms."

In Alexander *vs.* Bennett, 60 N. Y., pages 204-207, Judge Rapello said:

> "The jurisdiction which the constitution preserves of the courts named is inalienable and carries with it the corresponding duty on the part of those courts to exercise it when called upon in proper form so to do. The constitutional provisions protect the parties to an action brought in either of those courts in the right to require it to adjudicate the controversy between them."

To the same effect are Anderson *vs.* Riley, 66 N. Y., 189; Mussen *vs.* Ausable Granite Works, 63 Hun., page 367; Getman *vs.* Mayor, 66 Hun., page 236; City of Brooklyn *vs.* Mayor, 25 Hun., 612; Bell *vs.* Niewahner, 54 App. Div., 530; Moroney *vs.* State, 67 Misc. Rep., page 58.

In the last cited of these cases it was held that where a State takes private property for ordinary purposes, the legislature has no power, without the consent of the owner of the property, to confer upon the court of claims jurisdiction to determine such issues, which, under the constitution, are triable in the ordinary constitutional courts. It may be true that for many years condemnation proceedings have been tried in the probate courts of Alabama. Nevertheless, as will appear from the sections of the code of 1907 which we have cited (*supra*), the legislature of that State has failed to confer upon the probate courts jurisdiction in such cases.

It appears, furthermore, that the question now presented has never been heretofore raised nor apparently passed upon by the Supreme Court of Alabama, and there can be no escape from the proposition that section 149 (*supra*) of the constitution of 1901 of Alabama studiously limits and restricts the powers of the probate court; that thereunder said court is only given general jurisdiction of orphans' business, with power to grant letters testamentary and of administration. It is impossible, we respectfully submit, to construe this language so as to confer jurisdiction in condemnation proceedings upon the probate court. Therefore, any attempted legislation of the General Assembly of Alabama, however long acquiesced in, designed to give the probate court jurisdiction in condemnation proceedings, is utterly void and of no effect.

The fullest powers of a court of original jurisdiction in law and equity and in civil and criminal cases are, when the matter or sum in controversy exceeds fifty dollars, conferred by section 143 upon the Circuit Court of Alabama. It seems clear that under the constitution of 1901 of the State of Alabama the circuit court and the Supreme Court only would have jurisdiction in condemnation cases.

The Supreme Court of Alabama has been careful to preserve the constitutional distinction between courts of law and courts of equity, and between probate courts and courts of law and equity. *Ex parte* Lunsford, 117 Ala., page 225.

In this case last cited, it was held that courts of equity did not possess, prior to the constitution of 1901, power to appoint or remove executors or administrators, although the office had become vacant, that power being conferred by a former constitution upon the courts of probate, and no other court.

In order to confer such powers upon the chancery courts it seems a clause to that effect was inserted in the constitution of 1901 (section 149, *supra*).

The constitution of 1901 provides for eminent domain proceedings (section 23, *supra*), but makes no exception of

them from the general original jurisdiction of the circuit court over all litigated matters of a civil nature.

It has been held that eminent domain is of civil nature.

Kohl *vs.* U. S., 91 U. S., 367; Enc. Pl. & Pr., vol. 7, page 479.

The sections of the Code of Alabama (*supra*) attempting to vest jurisdiction in the probate courts for condemnation proceedings, being contrary to the constitution of Alabama, conferred as a matter of law no jurisdiction; therefore prohibition was the proper remedy to invoke under the facts as presented to the circuit court in the original petition.

Ex parte Roundtree, 51 Ala., 42.

The probate court of Tallapoosa County, being absolutely without any jurisdiction to proceed under the constitution of Alabama, it was not necessary first to raise its want of jurisdiction in that court.

Ex parte Morgan Smith, 23 Ala., 94.
Ex parte Hill, 38 Ala., 429.
Ex parte Burnette, 30 Ala., 461.
Ex parte Stickney, 40 Ala., 160.
Ex parte Hamilton, 51 Ala., 62.
Ex parte Dickens, 162 Ala., 272.

In *Ex parte* State *ex Rel.* Attorney General, 150 Ala., 489, the court said:

> "When it clearly appears that an inferior court has no jurisdiction of the subject-matter or of the parties to a legal controversy, a writ of prohibition is the remedy." (See *Ex parte* Hill, 38 Ala., 429; Bryan *vs.* McDuffie, 52 Ala., 4; *Ex parte* Boothe, 64 Ala., 312; *Ex parte* Lyon, 60 Ala., 650.)

The Supreme Court of Alabama by these decisions has placed itself in line with the decisions of other State supreme courts on the same subjects. (See Enc. of Law and Procedure, vol. 32, page 624, note 61.)

2.

On this branch of the case we further contended that prohibition was the proper remedy, because the probate court of Tallapoosa County was, in any event, without jurisdiction to proceed with a condemnation case of this character, in that the act of 1907 amending the act of 1903 (*supra*) and sections 3627-3637 were unconstitutional, because in violation of section 23 (*supra*) of the constitution of 1901 of the State of Alabama, and entirely beyond the power of the legislature of Alabama to enact under the express limitations thrown around the law-making body by the provisions of said section.

If the legislature of Alabama had no constitutional authority to pass the condemnation acts involved in this controversy, it necessarily follows that the condemnation proceedings were originated in the probate court without the warrant of legally conferred power. This is true, even if it be admitted for the sake of argument that the probate courts under the constitution of Alabama have jurisdiction over certain kinds of condemnation proceedings. Prohibition was the proper remedy, therefore, under the decisions we have heretofore cited, inasmuch as the probate court of Tallapoosa County, under such circumstances, would have no jurisdiction over a condemnation suit arising under a pretended law, itself unconstitutional and of no effect.

Of course the law-making body of a State has power to enact any laws that are not expressly or by necessary implication prohibited either by the Federal or State constitution.

In the absence of such constitutional prohibition the legislature could even authorize the condemnation of private property for private use, save as prohibited by the Constitution of the United States. Section 23 (*supra*) of the constitution of the State of Alabama of 1901, however, expressly prohibits the taking of private property for private use, and the legislature of Alabama is therefore powerless to enact a

law to so subject it within the constitutional limitations of the State's fundamental law.

But the constitution of Alabama goes very much farther than this. In the very same sentence in which it is forbidden to take private property for private use, the constitution prohibits the taking of private property *for the use of corporations* other than municipal, without the consent of the owner. We repeat this sentence: "Neither shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner." If the constitution had stopped at this point it would unquestionably have prohibited the taking of private property for the use of corporations other than municipal for any purpose whatever, without the consent of the owner; but section 23 (*supra*) provides further that the legislature, however, "May by law secure to persons or corporations rights of way over the lands of other persons or corporations and by general laws provide for and regulate the exercise by persons and corporations of the rights herein received." It seems clear from this that the only thing which can be condemned in Alabama is a *right of way* over the lands of other persons or corporations, and that this cannot be done except by means of general laws passed by the legislature regulating the method of condemnation, the only exception being that municipal corporations are, of course, authorized to condemn private property for public use. The right of one corporation other than a municipal corporation to condemn the lands or property of another corporation or of an individual is expressly denied and prohibited, except with the consent of the owner, with only one expressly named exception, viz: the securing of rights of way. This inhibition, as we have said, is found in the same sentence and is placed upon the same footing as the prohibition against taking private property for private use. Under elementary rules of construction one of these provisions cannot be stricken down or ignored without striking down the other.

The language used in the opening sentence of section 23, "Shall never be abridged," is merely declaratory of general law and its import must, of course, be gathered from the context. Thus construed it is manifest that the intent was to prevent any discrimination in favor of corporations by legislative exemptions of corporate property from condemnation where the property of individuals of a similar nature would be subject. If it had referred to abridgment of existing rights to condemn, it would have been unnecessary to confer the rights to condemn for rights of way, since such rights would already be condemnable.

There is another section on eminent domain found in the constitution of 1901, section 235, which provides as follows:

> "Municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured or destroyed."

This section, which imposes the duty of making compensation before such condemnation *as had been permitted* can be had, does not, of course, affect the previous section 23, stating under what conditions condemnation shall be permitted, and limiting the species of property and property rights which may legally be made the subjects of condemnation.

It may be decidedly inconvenient to construe section 23 of the constitution in accordance with the plain language, but if such inconvenience should result it would operate only as to private interests and in respect to condemnations had since the constitution of 1901 was adopted. It could work no public harm, because the right to condemn for rights of way is clearly conferred; and further, because ample powers of condemnation are conferred upon municipal corporations.

At all events the statutes invoked in the original condemnation proceedings are in palpable violation of the legislative prohibition contained in section 23 (*supra*) of the constitution of Alabama.

It follows that the probate court of Tallapoosa County was proceeding illegally, because these statutes themselves were unconstitutional or, rather, in violation of the constitution of Alabama.

3.

On this branch of the case we also contended that even if, for the sake of the argument, it be admitted that the probate court of Alabama has jurisdiction of condemnation proceedings, and further admitted, for the sake of the argument, that these particular condemnation statutes were constitutional, nevertheless the probate court did not have jurisdiction of this particular case under its peculiar facts; that is to say, if the construction contended for by the power company be held sound these statutes would be invalid, because no mode of executing the same is provided.

Section 3637 (*supra*) merely provides "That the procedure for condemnation under this article shall be in the manner provided for lands and rights of way for public use in article 1, chapter 79 (*supra*)" (Code sections 3860 and 3909, *supra*).

Under these statutes providing the method of procedure in the exercise of the right of eminent domain, it is provided that commissioners shall be appointed, who shall view the lands (section 3871) and determine their value and report the same to the probate court (section 3874).

Under the construction insisted upon by the water-power company it would first have to be ascertained how much water was required or was in use by the defendant corporations at "normal stages" of the stream and how much the stream furnished. The condemnation petition sought the right to cut an opening of two hundred feet in the defendants' dam. This certainly would invade a property right, but what would be the measure of damages? It would seem that a dam which reaches across a river and furnishes an adequate supply of water for the power-house and which

is sought to be condemned for that purpose, should be paid for "as a dam" and not according to the size of the opening. The opening would be valueless without a dam on either side of it, and with a dam on either side of it would afford the damming party all the advantages of a dam entirely across the stream. All that the defendant companies themselves use is an "opening," the dam being useful only in providing water from such "opening." Is the dam to be estimated upon the basis of the value of the entire dam or on the basis of the damage done to the property of the defendants by the divided control over this water? How would the amount of water passing through the opening be estimated? How is the size of the opening in relation to the excess of water to be determined, and upon what basis is the value of the water used to be determined? What shall become of the "opening" and the power-house when the water is below the normal flow of the stream? And the land for the power-house almost immediately under the dam, while as land its value could probably be estimated—is that the basis to be adopted or is its value in connection with the water-power to be taken into consideration? Is it approximate to the water furnished from the dam? These and numerous other questions which will suggest themselves to the court as growing out of the extraordinary conditions that would be created are left wholly undetermined by the statutes (*supra*) by means of which the right of eminent domain is exercised in Alabama, and it must be remembered that where the statute ends the right ends, except as to what is clearly implied from it.

It seems too patent for argument that the eminent-domain statutes, which provide merely a method for determining the value of land taken, furnish no legal means by which these questions and many others that would necessarily arise could be determined.

While it is true that "land" in its generic sense would include to a certain extent easements in such land, yet we have in this statute the term "hydraulic structures," "water

rights and privileges," to deal with, and unless the eminent-domain statutes as they stand provide for the determination of all such questions it necessarily follows they cannot be extended so as to authorize the presumption of such damages. That mere fact, we respectfully submit, that the eminent-domain statutes are adopted as a part of the statutes here involved, does not have the effect to enact such amendments to the said eminent-domain statutes as would accommodate them to an assessment of damages under said sections 3627-3637.

In Clark & Daviney *vs.* Jack, 60 Ala., page 271, the legislature of Alabama provided, in an act authorizing an election to locate the county seat of Franklin County, that the general election laws of the State should govern as far as applicable. Under this provision it was attempted to contest the election under the general election law, but the Supreme Court of Alabama held that as the general election law related only to the election of *persons* to office, and *must be applied as written*, they were inapplicable to an election to locate a county seat.

In Beason *et al. vs.* Shaw, 148 Ala., page 544, a statute which authorized an election to prevent stock from running at large expressly provided, "said election may be contested on the same ground and in the same manner before the probate court as contests of elections of constables are held before said probate court." The Supreme Court of Alabama, in construing this statute in this case, says:

> "The reference to the law applicable to contests of elections of constables *does not have the effect to change that law in any of its forms or in any respect* when resorted to for the purpose of contesting elections under the statute under consideration. But *it must be applied, if at all, as it is written.*"

Analogizing these two decisions to the eminent-domain statutes, it is evident that the only duty of the probate judge under these two eminent-domain statutes is to determine

whether the right to condemn exists and to appoint commissioners. Neither section 3637 *et seq.* nor the eminent-domain statutes give any authority nor furnish any method to the probate court to determine the numerous questions that must arise in such condemnation as is involved in this litigation; neither does either statute confer such power upon the commissioners.

Strictly construing both statutes, it must appear that there is a total omission to provide any means for determining these questions. This does not necessarily prove that the statute is void for indefiniteness (we insist such is the case), but does prove that no such construction as that contended for in the condemnation petition was ever contemplated by the legislature. The presumption is that if such had been the intention, the legislature would have declared in terms by whom these important duties were to be performed and how they were to be performed, and the statute would not have left it to mere conjecture.

So that even if the probate court of Tallapoosa County had had any jurisdiction at all over condemnation proceedings (which we deny), and even if we admit for the sake of argument that these particular condemnation statutes were not in violation of the constitution of Alabama, nevertheless these particular statutes were void and inoperative, because no method of condemnation was provided, and therefore the probate court of Tallapoosa County had no jurisdiction to proceed with this particular case, and prohibition was clearly the proper remedy.

In addition to the point just made, it is apparent that these particular condemnation statutes fairly bristle with ambiguities and uncertainties. What is the meaning of these statutes in declaring the power company shall not have the right to condemn the lands, hydraulic structures, or water rights of any cotton factory at any point upon the same water course, in actual and prior use by it for the operation of its plant, but may condemn lands, hydraulic struc-

tures, water, or water rights of such cotton factories in excess of what is actually in use or may be used at normal stages of the streams? It will be noticed that no right is given to utilize the water or water rights or the use of hydraulic structures, but the excess referred to may be an excess of land or of hydraulic structures, or of water, or of water rights, and an excess of either of these may be condemned. It is simply impossible to determine what the legislative intent was, with that definiteness certainly required by statutes of this character, where property is to be transferred involuntarily.

In State *vs.* Ashbrook, 154 Mo., page 375, it was said:

> "The ambiguity or uncertainty of the Missouri Anti Department Store Act of May 16, 1899, which leaves it a matter purely of guess work to determine whether the license fee is intended to be exacted for selling each of the seventy-three groups therein designated, and also failed to define the life and duration of the license to be issued * * * is sufficient to render the statutes void."

What is meant by hydraulic structures or by water rights? How can such hereditaments be viewed by commissioners, and how can commissioners by viewing determine all of the various matters that would have to be determined in order to ascertain whether there was an excess of hydraulic structures, or water, or lands over and beyond what was needed by the defendant corporations at the normal stages of the Tallapoosa River? The statute furnishes no means for determining, and, as we have said, it is impossible for any court to state just what was meant by the language employed. It may be conjectured to mean many things, but it cannot be certainly said to mean any one particular thing. If this construction of the statute is correct, and we respectfully insist that it is, the law is void for uncertainty.

In the case of City of Mobile *vs.* Eslava, 16 Peters, page 234, the court said:

> "The statute was badly drawn, and to vest a right to the same property in hostile claims would in itself be a nullity."

In Cook *vs.* State, 26 Ind. App., 278, it was held that an act making it an offense to use narrow-tired wakons for carrying a load of certain weights is void for uncertainty, since it furnishes no method of determining what constitutes a narrow tire. (See 36 Enc. of Law and Procedure, page 969, note 90; Warren County *vs.* Nall, 78 Miss., page 726.)

In Johnston *vs.* State, 100 Ala., page 32, an act which made it larceny to attempt to sell a registered dog or to hold such a dog for the purpose of reward, but did not declare whether it should be punished as petit or grand larceny, the statute was held void for uncertainty.

4.

On this branch of the case we next contended that this particular petition for condemnation was void on its face, and that for that reason the probate court of Tallapoosa County was entirely without jurisdiction to proceed. We notice that the said petition first alleges that the defendant corporations generated a limited amount of power from the waters of the river, "but greatly less than the capacity of said river." If this averment can be said to approach the jurisdictional facts mentioned in section 3627 relative to cotton factories it could only be held to allege *an excess of water.*

The next averment of the petition also relates to an excess of water, anticipated as a result to follow the erection of a proposed dam by the power company. It is alleged that "the flow of the river will be greatly increased at certain seasons of the year, resulting in an increase of water power largely in excess of what is now in actual use by it or may be used by it at normal stages of the stream, in the operation of said cotton factories as established at the time this con-

demnation proceeding is commenced." It will be seen that this averment relates to an excess *to be created by means of a dam of the power company,* and not to a *natural excess of water* existing at normal stages of the stream.

The next averment is to the effect that petitioner "desires and seeks" certain things, namely, to acquire the following-described lands, water, and water rights of the defendants "in excess of what is actually in use by them or may be used by them at normal stages of said Tallapoosa River in the operation of said cotton factories as established at the time this proceeding is commenced." It is manifest that this does not allege that any excess of any sort in fact existed, and the only excess that had previously been alleged to exist was *an excess in the flow of the river created artificially by the dam of the power company.* It is perfectly clear from the petition that *no excess of land over what was required by the defendants at the normal flow of the stream is anywhere alleged to exist.* We insist, therefore, that under this petition no lands could be condemned and no excess of water could be condemned; and, if right in either of these contentions, the whole petition is utterly bad, since the lands and water sought to be condemned are so interdependent as that both must be condemned or neither can be.

We insist that this construction of the petition is the only proper or possible one. This left only one question in the case, viz: Could a condemnation be had under these statutes of or for an excess of water *artificially created* by act of the power company? We have heretofore called attention to the fact that the dam of the defendant corporations was located ten miles down-stream from the proposed dam of the power company. Certainly it would devolve upon the power company to allege facts to show that the condemnation prayed would aid in its public purpose, and, therefore, to show some sort of relationship or connection between the two plants. It does allege that it proposes to impound water in the wet seasons to be furnished to the defendant corporations in the dry season, and that is the

only possible link between the two. We insist that furnishing water is not a public purpose, and it has, of course, nothing to do with the manufacture or sale of electricity—that is, the furnishing of it to a proprietor lower downstream; and as the petition seeks to condemn the excess so furnished, and (we might admit for the argument's sake) the natural excess of the stream indistinguishably, the entire petition again is bad, if either should not be subjected to condemnation. In other words, if the uniting in one act of a public and private use indistinguishably would vitiate the entire act, the inclusion in the petition for condemnation of two grounds, one authorized by the statute and the other not, would, where the condemnation is sought indistinguishably for both, vitiate the entire petition. While the statute recognizes that foreign corporations may exercise in the State of Alabama all the rights conferred upon them by their charters, it confers the right of condemnation for one purpose only, viz: "The right to manufacture, supply, and sell to the public power produced by water as a motive force." (See Jones *vs.* N., C. & St. L. R. R. Company, 141 Ala., page 388.)

It is impossible to read in this statute the power to impound *extra water* or to sell it to the lower proprietor. But even if it were possible to so construe the act, that would not be a public purpose for which the right to condemn could exist.

> "The individuals who could avail themselves of this privilege (of using extra water) would ordinarily not be numerous enough to be fairly said to enjoy it as members of the public" (Nichols on Eminent Domain, paragraph 226).

We take it, therefore, as too clear for argument that the right to condemn a plant of the defendant corporations for the purpose of utilizing extra water-power impounded by the power company is not conferred by the statute. This being so, and condemnation being sought for the purpose of

utilizing both the waters impounded and (possibly) the natural excess of the stream, it follows that, if the property could not be condemned for the purpose of utilizing the excess impounded, it could not be condemned at all.

The Supreme Court of Alabama in the case of Sadler *vs.* Langham, 34 Ala., page 311, in dealing with a situation somewhat similar to the one at bar, says:

> "We have then the case of a statute which in the employment of a generic phrase without expressing the different species included in that genus, attempts by words not separable to confer a general authority, a part of the patent objects of which are within and others without the path of constitutional power. In such cases we have no discretion but to pronounce the entire clause unconstitutional."

In McCulley *vs.* Cunningham, 96 Ala., page 583, the Supreme Court of Alabama held that in respect to condemnation proceedings the probate court is a court of special limited jurisdiction, and that its proceedings are void "unless they affirmatively disclose every fact necessary to uphold the jurisdiction." It was held further in that case that, where a petition for condemnation failed to show that the mill proposed to be erected was to be operated for the benefit of the public, and where the petition proposed, besides the mill, to "operate other machinery," without stating it was machinery for a gristmill, sawmill, or factory, "the petition was fatally defective."

In Bottoms *vs.* Brewer, 54 Ala., page 288, the record was silent as to whether the mill sought to be erected was a gristmill, which was to grind for the public for toll, and it was held the court was without jurisdiction.

In Lewis on Eminent Domain, section 206, it is said:

> "If a private use is combined with a public use in such a way that the two cannot be separated, the whole act is void."

Here it is evident that this petition for condemnation seeks to condemn for the purpose of utilizing extra water created by the act of the power company, and (possibly) to condemn so as to utilize a natural excess of water existing at normal stages of the stream and to utilize both indistinguishably through a single opening in the defendant's dam. Not having the right to condemn for both of these purposes, even if it be admitted for the sake of argument that petitioner had the right to condemn for the natural excess, the petition is entirely bad under the authorities we have cited.

Further, even if it be admitted for the sake of argument that the natural excess of water could legally be condemned, we respectfully insist that the statute nowhere gives authority to utilize this excess by erecting a power-house absolutely disassociated and disconnected from the original plant, and to operate said power-house from an opening cut in the dam of a corporation ten miles down-stream from the original plant.

Authority to exercise powers for condemnation such as these must be plainly and clearly conferred, and nowhere in the statute are such powers conferred. Why in terms, as a condition precedent for the exercise of any alleged powers of condemnation, should the statute require that a dam site should be first acquired *otherwise than by condemnation* unless it was intended to be utilized? It is the clear intendment of this statute, we respectfully insist, that before the petitioner could show any pretended right of condemnation thereunder at all it must appear that it had not only acquired the dam site, as specified in the statute, *otherwise than by condemnation*, but that it had actually built a dam at its dam site, and had impounded waters therein and had constructed a power plant in connection therewith. The statute either means this or else the provision which specified what sort of dam site the condemning party must have acquired before he can proceed at all is a mere arbitrary requirement without any rational significance. It is apparent that if the power company may,

by condemning an opening in the dam of another corporation down-stream from its own dam site, secure all the advantages that it could acquire by building a dam of its own, it would always use the dam of some other corporation. If this is the proper construction of this remarkable statute, there is no provision therein for compelling the power company thereafter to construct any dam at all at its dam site. If the power company can condemn the dam of the defendant corporations in advance of the construction of its own, there can never be any legal certainty that it will construct one at its original site. Nevertheless, the bald contention of the petitioner is that a mere fact of ownership of two acres of land ten miles up the stream, acquired otherwise than by condemnation, arms it with the right and power before the commencement or completion of any dam or plant at said two acres; and while the erection of a dam or plant is merely *proposed*, to seize upon any plant lower down the stream and exercise the power here claimed.

In Attorney General *vs.* Leeds Corp., L. R., 5 Ch., 583, 588, 596, the city of Leeds was authorized by act of Parliament to empty its sewage in the river Ayre. The city claimed exemption from liability for nuisances committed in the progress of the work, because the act of Parliament omitted the usual affirmative declaration contained in such acts of liabilities for such nuisances. James, V. C., held that the exemption did not exist; that the act could not bear the construction claimed, and said that he would feel bound to put any construction on the act "that would prevent such monstrous injustice." The case was affirmed on appeal, Gifford, L. J., saying: "On construing this act one must always consider that if it had a different meaning it would be against common sense," a remark entirely applicable to the case before the bar of this court when the court is asked to construe the statute of Alabama cited (*supra*) as contended for in the petition for condemnation.

Where the proper construction of a statute is otherwise doubtful, arguments from the inconvenience, absurdity, in-

justice, or prejudice to the public interests resulting from a proposed construction may be considered (Enc. L. & P., 36, pages 1111-1112, notes 70, 71, 72, 73).

Where the meaning of a statute is doubtful the construction most agreeable to reason and justice should be adopted as embodying the intention of the lawmakers, for it will not be presumed that the legislature contemplated unreason or injustice (Am. Eng. Enc. of Law, vol. 26, page 646, and notes).

5.

On this branch of the case we further contended that this petition for condemnation was absolutely void, because there was a total absence of any averment that the condemnation of the property sought was necessary in the accomplishment of the purposes named in the statute. There are three reasons why such an averment is essential, viz: (*a*) section 3627 (*supra*) of the Code of Alabama, in the second paragraph, confers the right to condemn only when the property to be condemned is necessary for the proposed works. (*b*) Under well-recognized principles of the law of eminent domain the property of one corporation devoted to a particular use cannot be condemned in favor of another corporation for a similar use, unless it is necessary. The Supreme Court of Alabama, in dealing with this question in Anniston, etc., R. R. Company *vs.* Jacksonville, etc., R. R. Company, 82 Ala., 297, 300, had the following to say:

> "By what power can the supreme function of the Government be exercised? * * * Such power does not extend to property already adjudicated or condemned, or acquired and held by another corporation for public use unless it is expressly given by the statute conferring the jurisdiction."

A great number of cases are cited in support of the decision, and as this is an elementary principle of the law of eminent domain we make no further citation of authority.

In the enumeration of the restrictions on the exercise of the alleged right of condemnation as set out in the last paragraph of section 3627 (*supra*), it is provided that such corporations (*e. g.*, the power company in this case) shall have no right to condemn lands, water, or water rights in use for power purposes by another corporation upon the same water course having *"similar powers* and essentials to its *operation."* The defendant corporations had the right to use the water to generate electricity of equal dignity with the right of any power company, and the fact that the power company generated it for the purpose of selling the power generated, and the factory company for the purpose of using the power generated in its business, does not so distinguish the two, as we respectfully insist, as to make the rights of the one essentially different from the rights of the other. In fact, the powers proposed to be exercised by the power company and those now *actually exercised* by the defendant corporations are certainly essentially *similar,* although not identical. (*c*) But even if it be admitted, for the sake of argument, that the powers of the companies to use the water are in law to be regarded as dissimilar powers, nevertheless the condemnation sought by the petition in question is prohibited in terms by section 3867 of the Code, which provides:

> "If the property sought to be condemned or any portion thereof, or any interest therein has already been subjected or *devoted* to a *public* use, such lands or portions thereof, or interests therein shall not be taken for another and *different* character of public use, unless an *actual necessity for the specific lands or portions thereof or interests therein shall be alleged and proven,* and unless it be alleged and proven that such other and different character of public use will not materially interfere with the public use to which said property is already subjected or devoted."

An examination of the petition for condemnation shows that the property sought to be condemned thereunder is actually being now devoted to a public use, in that it shows

that cotton factories are being operated with the water impounded by the dam, a part of which is sought to be condemned. Certainly the operation of a cotton factory is as much a public use as the sale of power. The statute expressly authorizes the organization of corporations for the operation of cotton factories, and they are invested by the statute with the right of eminent domain, which, of course, can only be done where the use is a public use.

In section 3888 of the Code of 1907 of the State of Alabama it is provided as follows:

> "A dam for any grist-mill, sawmill, gin, factory or plant to generate electricity by water-power to be operated for the public may be erected across any water course, not a navigable stream, by the owner in fee of the land on both sides of the stream, or on one side at the place where the dam is proposed to be erected, by proceeding as in this article provided."

Thus it will be seen that cotton-factory corporations and *plants to generate electricity by water-power* (which accurately describes the power company in this case) are placed upon the same footing as respects the power of condemnation.

All these sections must be construed *in pari materia.* Aside from the statute it might be doubted whether a power company which is distinguished by the statute from an electric light company (Code, sections 3482-5-6-3501) and which merely sells power, but does not engage in the work of installing or distributing it, could be said (as we have seen) to be engaged in work of a public nature amounting to a public use.

Nichols on Eminent Domain, paragraph 226.

State *vs.* White River Power Company, 39 Wash., page 648; 2 L. R. A. (N. S.), 842.

Certainly the use would not be more of a public use than the operation of a cotton factory which has built up a town

of three or four thousand people and which furnishes thousands of persons with employment.

Head *vs.* Amoskeag Company, 113 U. S., page 9.

6.

On this branch of the case we next contended that under the statutes aforesaid by no possibility could the railroad of the defendant corporations legally be condemned.

M. & G. R. R. Company *vs.* Ala. Midland Rwy. Co., 87 Ala., 501.

2 Lewis on Eminent Domain, 3d edition, sections 418 *et seq.*

7.

We also contended that the petition did not sufficiently describe the two acres acquired by the power company as a site for its "intended" dam.

By reference to paragraph 5 of the petition (Record, pages 8 and 9) it will be seen that the two acres which the power company claimed it had acquired was located ten miles upstream from the dam of the defendant companies, and could not, therefore, by any possibility have any physical or other relation to the plant, hydraulic structures, and the other properties belonging to the defendants sought to be condemned. The ownership of these two acres, the acquiring of which is made a condition precedent to the right to condemn, is not sufficiently alleged to give the court jurisdiction. The petition merely alleges that the power company has acquired two acres on each and opposite sides of the Tallapoosa River in section 36, township 18, range 21.

Such a description would be wholly insufficient if this was the particular property which was sought to be condemned. The test in all decisions as to the sufficiency of the descriptions of the property sought to be condemned is that the pleadings must contain such a description as would enable

a skillful person to locate it from the averments of the petition.

London *vs.* Sample Lumber Company, 91 Ala., 606.
N. C. & St. L. R. R. *vs.* Hobbs, 120 Ala., 600.

It is necessary to allege in the same manner and with the same particularity and in similar detail all descriptions of property alleged to be owned by the condemning party, since its ownership is a condition precedent to the exercise of the right.

Brown *vs.* R. & D. R. R. Company, 86 Ala., 206.
In re N. Y. C. R. Company, 70 N. Y., 191.
In re Water Commissioners of Amsterdam, 96 N. Y., 360.
People *ex Rel.* Eckerson *vs.* Trustees, etc., 137 N. Y., 88.

We also call especial attention to the elaborate opinion of Justice Harden on this subject in City of Syracuse *vs.* Stacey, 86 Hun., 441 (E).

Upon similar principles, the petition is fatally defective, in that it does not describe with sufficient particularity the water sought to be condemned. A pleader cannot content himself with alleging his ground in the words of the statute in such a case in a court of limited special jurisdiction.

Eminent Domain Statutes Strictly Construed.

1.

It is an elementary principle in the law of eminent domain that statutes granting this sovereign power are strictly construed.

Lewis (third edition), in his excellent work on "Eminent Domain," paragraph 388, has to say as follows:

"All grants of power by the government are to be strictly construed, and this is especially true with

> respect to the power of eminent domain which is more harsh and peremptory in its exercise and operation than any other."

A large number of cases from every State in the Union are cited in support of the text, "If there remains a doubt as to the extent of the power after all reasonable intendments in its favor, the doubt should be solved adversely to the claim of power."

> N. Y., etc., R. R. Company *vs.* Kip, 46 N. Y., 546; 7 Am. Rep., 385.

In the matter of Poughkeepsie Bridge Company, 108 N. Y., 483, 490, 491, the New York court said as follows:

> "In construing the statutes which are claimed to authorize the exercise of the power of eminent domain, a strict, rather than a liberal construction is the rule. Such statutes assume to call into active operation a power which however essential to the existence of the government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property. The rule of strict construction of condemnation statutes is especially applicable to delegations of the *power by the legislature for private corporations.* The motive for the promotion of such corporations is usually private gain, although their creation may subserve a public purpose. When such corporations claim to exercise this delegated power the rule of strict construction accords with the ordinary rule that delegations of public powers to individuals or private corporations are to be strictly construed in behalf of the public, and by the other principle that private rights are not to be divested except by the clear warrant of law."

As to how such statutes should be construed by the courts, the Encyclopedia of Law and Procedure, vol. 15, page 567, lays down the law as follows:

> "The power of eminent domain being in derogation of the common right, acts conferring it are to be

> strictly construed and are not to be extended beyond their plain provisions. The right to exercise the power is strictly limited to the purposes specified in the statute conferring it. The proposed use of the lands of the owner must be clearly embraced within the legitimate object of the power conferred. Where there is any doubt in regard to the extent of the power, the land owned must have the benefit of that doubt."

Upon the same subject, Hon. Emory Speer, judge of the District Court for the Southern District of Georgia, in the case of The U. S. *vs.* Rauers, expressed himself as follows (70 Federal Reporter, 748):

> "A foundation principle of law controlling all matters of this character is that every statute which undertakes to appropriate in any manner the property of private persons for public use, must be strictly construed. One of the great aims of government is to secure to each citizen the enjoyment of his estate. On the other hand, in cases of public necessity the right of the individual must yield to the right and demands of the public; but since that demand is in derogation of private rights, it must be closely scrutinized, and the expression of legislative purposes in which it is conveyed must be strictly construed."

Judge Speer cites Cooley, Constitutional Limitations, page 61, to the following effect:

> "So high a prerogative as that of divesting one's estate against his will should only be exercised where the plain will of the law permits it and under a careful observance of the formalities prescribed for the owner's protection. Express legislative power, moreover, is needed for these purposes. It will not follow that because such things are not convenient to the accomplishment of the general object, the public may appropriate them without express authority of law, but the power to appropriate must be clearly conferred (*Idem*, page 66)."

> "The act authorizing condemnation must be express and clear. If there are doubts as to the extent of the power after all reasonable intendments in its favor, that doubt should be resolved by a decision adverse to the claim of power."
>
> (Mills on "Eminent Domain," paragraph 48.)

Judge Brewer, in McElroy *vs.* Kansas City, 21 Fed., 260, comments upon the necessity of a strict construction of such statutes, in the following language:

> "In this day of enormous property aggregation where the power of eminent domain is pressed to such an extent, and when the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of a strict enforcement of those constitutional provisions intended to protect every man in the possession of his own."

In Binny's case, 2 Bland, Ch. (Md.), 99, Judge Bland says:

> "An act of this sort deserves no favor; to construe it liberally would be essentially against the rights of property. The power to condemn private property is a portion of the eminent domain of the Government granted to the body politic which should never be exercised by the Government itself but with great caution and in cases most obviously for the public good. When, as has been wisely observed in our country, the legislature undertakes to give away what is not their own, when they attempt to take the property of one man which he has fairly acquired and the general law of the land protects, in order to transfer it to another, even upon a complete indemnification, it will naturally be considered as an extraordinary act of legislation which ought to be noticed with jealous eyes, examined with critical exactness and scrutinized with all of the severity of legal exposition."

This same doctrine has so often been declared in Alabama that it has become axiomatic and the settled rule of

construction in that State for all statutes purporting to confer the power of condemnation.

Ex parte Morgan Smith, 23 Ala., 94.
Sadler *vs.* Langham, 34 Ala., 311.
Ex parte Hill, 38 Ala., 429.
Ex parte Stickney, 40 Ala., 160.
Bottoms *vs.* Brewer, 54 Ala., 288.
Ex parte Lyon, 60 Ala., 650.
N. C. & St. L. Rwy. Co. *vs.* Hobbs, 120 Ala., 600.
Birmingham Rwy. Co. *vs.* Trac. Company, 121 Ala., 479.
Hobbs *vs.* N. C. & St. L. Ry., 122 Ala., 602.
Ex parte State *ex Rel.* Attorney General, 150 Ala., 489.

2.

The Authority Must be Strictly Pursued.

Mr. Lewis, in his work on "Eminent Domain," paragraph 387, on this subject, quotes from Darrow *vs.* Chicago, etc., R. R. Company, 169 Ind., 99, as follows:

> "As private property can be taken for public use against the consent of the owner only in such cases and by such proceedings as may be specially provided by law, and as these proceedings are not according to the common right, and are in derogation of private right and as they wholly depend on statute regulation (in this State) any one using this extraordinary harsh power must comply with all the provisions of the statute."

A large number of cases are cited in support of the text and will be found upon examination to be pertinent and in point.

> "Every condition prescribed in the grant must be complied with and the proceedings must be conducted in the manner and with the formalities prescribed in

> the grant of power. Formalities and modes of procedure prescribed are of the essence of the grant which the courts cannot disregard on a conception that they are not essential."
>
> State *vs.* Jersey City, 54 N. J. L., 49.

Applying well-settled principles of law to sections 3627-3637 of the Code of Alabama of 1907, the conclusion is inevitable that the averments contained in the petition for condemnation show affirmatively that the probate court of Tallapoosa County was wholly without jurisdiction in the premises.

Constitutional or Federal Questions.

We have heretofore directed particular attention to the assignments of error in the case now before this court (Record, pages 43, 44) and have set them forth herein specifically and in detail.

The first, second, third, and fourth assignments of error involve similar questions of law, although in different aspects, inasmuch as they invoke the protection of this court against the invasion of rights guaranteed under the Fourteenth Amendment to the Constitution of the United States, the enjoyment of which fundamental rights we claim was denied in the court below, for the various reasons assigned in said specifications of errors.

In the fifth assignment of error it is contended that these several statutes of Alabama heretofore quoted in full are against common right, and are, therefore, violative of the rights of property guaranteed by the Constitution of the United States.

The sixth assignment of error presents the proposition that these statutes of Alabama are a fraud upon the State of Alabama and upon the United States, for the reasons detailed in said assignment.

The seventh assignment of error is predicated upon the proposition that the purpose sought to be accomplished and

subserved through the original petition for condemnation involved in this case, to wit, *The sale of power generated by water,* is not a public purpose.

The eighth assignment assigns as error separately and severally each of the eighteen grounds of objection urged in the petition for prohibition in the court below.

Inasmuch as we think the fifth and sixth assignments of error raise practically the same questions of law, we will argue them together, and will, for convenience, do so at this point in the discussion of the various propositions involved.

We think it will be helpful to the court in its consideration of the statutes drawn in question to be advised at this point as to how the words "up-stream and down-stream therefrom" were inserted in sections 3627-3637 of the Code of Alabama of 1907.

To advise the court in this regard is to elucidate our contention that the legislature of Alabama has never passed any act, in accordance with the fixed constitutional rules of that State relative to the enactment of statutes by legislative bodies, which could by any construction be made the basis of the condemnation undertaken to be done as hereinbefore set out.

The legislature of Alabama, by an act passed September 30, 1903, provided for the appointment of a Code commissioner, the pertinent parts of said act being as follows (Acts of 1903, page 299):

> "SECTION 1. That the legislature shall, as early as practicable after the passage of this act, elect one commissioner whose duty it shall be to revise, digest, and codify all the statutes of this State of a general and public nature, both civil and criminal, including such acts as may be passed at the present session of this legislature.
>
> "SECTION 2. Such commissioner shall revise and reduce into a written and systematic code of the whole body of the public statutes of this State, civil and criminal, and the said code shall be divided into

three volumes, one concerning the political, one the civil and the other the criminal statutes, and each volume shall be bound separately.

"SECTION 3. It shall be the duty of said commissioner at least three months before the meeting of the next legislature to deliver said code to the Governor of this State, together with a sworn statement, showing all the changes he shall have made in the phraseology of all the acts and laws codified by him, including additions thereto and omissions therefrom, with accurate reference to the acts and laws so altered or changed; and it shall be the duty of the Governor carefully to examine the same, and to specifically report upon the same to the legislature of 1907, recommending such alterations, if any, as to him seem proper; attaching to his report the sworn statement of the commission herein provided for.

"SECTION 4. Said commissioner shall prepare appropriate chapters, titles and subdivisions of titles for each chapter, clearly and briefly expressive of the subjects treated, which shall be arranged alphabetically, bringing into each chapter, as near as may be, a condensation of all public laws, appertaining to the subject treated in each chapter; said commissioner shall not simply transfer or transcribe the laws but shall (without changing the sense) so alter the phraseology as to exclude all redundancy or obscurity of expression, and where there shall be several acts relating to the same subject, they shall be condensed into one, and so expressed as clearly to set forth the sense of the whole, having regard to the judicial exposition thereof; whenever it shall be apparent that there may be legislative omissions in any statute, said commissioner shall supply the same so as to perfect such statute and render its operation complete and shall add such original notes and references as shall be proper for the clear elucidation of them and for each reference to the several laws from which they may be compiled, showing, as far as may be, when such acts and statutes became operative, when amended, with foot-notes of all decisions of the Supreme Court, construing or mentioning such sections or acts, and a

brief and concise statement of the question decided by such decisions.

"SECTION 11. Said commissioner shall prepare and submit to the Governor, when he submits the code, as is hereinbefore provided, such bills as he may deem necessary or proper for perfecting, harmonizing or improving the system of laws of Alabama, which he cannot embrace in the code as hereinbefore provided, which bills the Governor shall carefully examine and report to the legislature of 1907, with such suggestions in regard to the passage or amendment of said bills as he may deem proper."

Pursuant to the terms of section 1 of the aforesaid act, Honorable James J. Mayfield was shortly afterwards elected Code commissioner, and as such, pursuant to the terms of section 1 of the aforesaid act, made his report to the Governor of Alabama. At the next session of the legislature of Alabama, in 1907, an act was approved February 15, 1907 (see General Acts of Alabama of 1907, page 110), the pertinent parts of which are as follows:

"SECTION 1. That there is hereby created a joint committee to be composed of three senators and five representatives, who are hereby authorized and required to read, during the recess of the legislature the whole manuscript of the new code, as prepared by Hon. James J. Mayfield.

"SECTION 2. The committee shall revise, amend and correct the manuscript so as to make it a harmonious body of law, as nearly perfect as possible, and in doing this, they shall keep correct minutes of their proceedings, to be signed by the chairman of the committee, and returned with the manuscript, so that their amendments, and corrections may be correctly incorporated in the published code.

"SECTION 6. The joint committee shall codify and incorporate in the manuscript code, all general acts passed by the legislature at this session."

We have heretofore called particular attention to the fact that the original condemnation act upon which this contro-

versy is predicated was passed by the legislature of Alabama October 1, 1903 (see Acts of 1903 of Alabama, pages 365-369), and that under the terms of this act the words "up-stream and down-stream therefrom" are not to be found. It will be recalled, furthermore, that these particular words admittedly form the sole basis for the claim that the properties and rights sought to be condemned are in terms of the statute condemnable. We have also set out the pertinent parts of the amendment to the last-mentioned act as passed by the legislature of Alabama on March 12, 1907. (See General Acts of Alabama of 1907, pages 439-442.) In the language of this amending act as passed by the legislature the words "up-stream and down-stream therefrom" do not appear. The whole act having been passed several months after Mr. Mayfield, the Code commissioner, made his report above referred to, naturally enough these words were not included in the manuscript of his said report. (See Report of James J. Mayfield of 1907, pages 91, 92.) The amending act of 1907 (*supra*) considerably amplified the powers conferred in the original act of 1903 (*supra*). An examination of the last-mentioned act, however, will show that the words "up-stream and down-stream therefrom" were not included. Up to the time of the appointment of the joint committee provided for under the act of February 15, 1907 (*supra*), therefore, the declared policy of Alabama relative to property which power companies could in the exercise of their statutory powers condemn was clearly and explicitly limited so as to comprehend property or rights *up*-stream from the proposed dam of the power company; and it is certain that the power and authority to condemn land, hydraulic structures, or water rights *down*-stream from the dam of any proposed power company did not appear in the statute law of Alabama, as set out in record of laws or acts prior to the adoption of the Code of 1907.

The Code of 1907 of the State of Alabama was adopted by the legislature in an act approved July 27, 1907 (see

General Acts of Alabama, 1907, pages 499, 500), the pertinent parts of which act are as follows:

> "SECTION 1. That the work prepared by James J. Mayfield under 'An act to provide for the revision, codification, digestion and promulgation of the public statutes of this State, both civil and criminal,' approved September 30, 1903, is as the same has been revised, amended, corrected and reported by the joint committee of the two houses of the legislature, which is shown upon the sheets of manuscript signed by the chairman of the joint committee, adopted and enacted as the Code of Alabama, and shall regulate completely *so far as a statute can,** the subject to which it relates, and shall go into force and be operative on the thirtieth day after the date of the Governor's proclamation announcing its publication.
>
> "SECTION 2. No act passed on or after the ninth day of July, 1907, shall be repealed or affected in any manner by the adoption of this Code. All acts amending sections of the Code of 1896 which sections have been incorporated in this Code, shall be printed in the place of and as such sections.
>
> "SECTION 3. All acts of the present session of the legislature passed on and after July 9th, 1907, which are of a general nature, shall be incorporated in the Code at the appropriate place with reference to its subject matter and become and be published as a part of the Code so that every statute of a general nature of this State in force, at the time of the publication of the Code shall be incorporated therein."

It will be perceived that under section 3 of this act, all the general laws which were passed at the session of the legislature of the State of Alabama in which the Code was adopted (1907) were to be incorporated in the Code at the appropriate places. Under this provision the amending act of 1907, which was approved March 12, 1907 (see acts of 1907, pages 439-442), became part of the law to be in-

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(*NOTE.—Underscoring ours.)

corporated in the Code as passed at the appropriate place, but it is very clear that no authority was given to anybody by the legislature to change the sense or the essential phraseology of the amending act of 1907 aforesaid. It was to be incorporated in the Code either exactly or substantially as it was written and passed by the legislature. This is made manifest, furthermore, by section 1 of the adopting act (*supra*), wherein it was provided that the work prepared by James J. Mayfield, as the same had been revised, amended, corrected, and reported by the joint committee of the two houses, as shown upon the sheets of manuscript signed by the chairman of the joint committee, was adopted and enacted as the Code of Alabama, *so far as the statute could accomplish that purpose.*

Section 4 of the act of 1903, providing for the election of a Code commissioner, specifically prohibited his changing the sense of any of the laws attempted to be codified. It will be further noticed that the joint committee provided for under the act of February 15, 1907 (*supra*), was only given authority "to revise, amend, and correct the manuscript" of the Code commissioner (James J. Mayfield), so as to make it a harmonious body of law as nearly perfect as possible. Relative to the duties of this joint committee touching such acts as might be passed at the same (1907) session of the legislature, they were simply directed to "codify and incorporate in the manuscript code all general acts passed by the legislature at this session" (see section 6).

It is indisputable, therefore, that this joint committee had no more authority to enact new laws than did the commissioner, Honorable James J. Mayfield.

After a careful study of these several acts to which we have called attention, we submit it is impossible to escape the conclusion that at no time did the legislature of Alabama give authority to any one to enact new laws into the Code of 1907, under the guise of working out a codification of existing laws.

It seems too clear to admit of debate that the legislature

on every occasion when they dealt with the subject of the preparing of the new Code was careful to provide that it should be, when adopted and promulgated, merely a harmonious expression of the existing laws of Alabama presented in codified form. If, as we assert with great confidence, prior to the adoption of the Code water-power companies were not given by any statute the right to condemn lands, hydraulic structures and water rights *down-stream* from their proposed dams, it follows inevitably that if such companies now claim to have any such right down-stream such claim can be based only on the language informally inserted, as above pointed out, in the codification of the amending act of 1907 (*supra*) by the joint committee. The unauthorized insertion in the enacted statute by said committee of the words "down-stream" purported to give to such power companies for the first time the rights claimed in this litigation. The question, therefore, arises whether the statute, so called, appearing in the Code for the first time in its form as codified and, acquiring its distinctive provisions under the extraordinary circumstances recited, did ever in fact become the law at all. Can a joint committee appointed by a legislature to revise the manuscript of a proposed Code legally create law not appearing in such manuscript, or give to a statute a significance it had not had theretofore? Can this be done in the vastly important matter of invading property rights and taking private property for alleged public use by way of condemnation? We respectfully assert that to state this proposition is to argue it. We further maintain that to permit the assertion of an alleged right acquired under the language of a condemnation statute inserted in the body of a law thus informally, and in no other way, is a denial of due process as guaranteed under the Fourteenth Amendment, because the alleged right is based on no provision of a legally enacted law and is a mere nullity, without warrant of law. Before it is possible to work an involuntary alienation of property, under the Fourteenth Amendment, it is first necessary to have some

valid law as a predicate, and then it is necessary to proceed by due process, pursuant to the terms of such law or enabling act, before the rights conferred by such law may legally or constitutionally be availed of.

As to the authority of the legislature to enact laws in Alabama, and the necessary formalities therefor, the constitution of 1901 is very illuminating and instructive. (See Constitution of Alabama, 1901, vol. 3, page 44.) Section 44 is as follows:

> "The legislative power of this State shall be vested in a legislature, which shall consist of a senate and house of representatives."

Section 45 provides:

> "* * * Each law shall contain but one subject which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest or revision of statutes; *and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length.*"

Section 63 provides:

> "Every bill shall be read on three different days in each house and no bill shall become a law unless on its final passage it be read at length and the vote be taken by yeas and nays," etc.

Section 66 provides:

> "The presiding officer in each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislature after the same shall have been publicly read at length immediately before signing, and the fact of reading and signing shall be entered upon the journal; but the reading at length may be dispensed with by the two-thirds vote of the quorum present, which fact shall be entered on the journal."

In section 125 it is provided that every bill that shall have passed both houses of the legislature, except as otherwise provided in the constitution, is to be presented to the Governor, who may approve or disapprove it.

There is thus a comprehensive plan of constitutional legislation in the State of Alabama which was of force at the time the words "down-stream" were inserted in sections 3627-3637 in the manner we have heretofore pointed out, which comprehensive plan is based upon the theory that no law shall be passed except by the legislature with the approval of the Governor. It is contemplated that no law shall be enacted until its provisions shall be thoroughly considered by each house; that there shall be an orderly and deliberate procedure with respect to the mode of enactment, and that, even after passage, the presiding officer of the house shall sign the bill only after it shall have been publicly read at length immediately before he attaches his signature thereto.

It is expressly provided, too, in order to assure a complete understanding as to the import and meaning of a law, and to give a full opportunity for thorough consideration, that the act shall contain but one subject, excepting only in certain specified legislation, where the nature of the proposed act precludes the feasibility of adhering to this provision.

This is a salutary scheme of legislation. It places the responsibility for legislation on the members of the legislature and not upon any particular committee or individual. It requires the full text of the law to be placed before the law-makers in open session that they may for themselves see and know what laws they are making.

The constitution expressly prohibits legislation by mere reference to the title of the proposed act. In the matter of the "Amendment," now under consideration, however, not only does this reputed revision of regularly enacted legislation offend against the letter of the constitution, but it offends most grievously against the spirit. Not only

does the legislature undertake to enact laws by mere reference in language of the most general character to another document as containing the law which is about to be enacted, but the document thus referred to does not set forth acts previously passed by the legislature, easy to find upon the existing statute books or by simple reference to the acts having the sanction of the legislature and of the Governor; but reference is made to a report of a joint committee of the two houses of the legislature, "which is shown upon the sheets of manuscript, signed by the chairman of the joint committee." There is nothing to indicate where this manuscript is to be kept. There is nothing to indicate that each sheet has been authenticated. There is nothing to prevent the changing and alteration of the text.

We have already directed attention to the fact that the act of 1903 limited the Code commissioner to the revision of existing law, with the power to eliminate redundancies of expression and to elucidate such provisions as might be obscure in terms as expressed, and, as pointed out, the joint committee had no authority to insert new law into the revision.

A consideration of section 3627 indicates, however, that notwithstanding the limited powers of revision there has been a wide departure in the codification of this statute, not only from the original act of October, 1903 (see page 365), but also from the amending act passed at the 1907 session of the legislature after the report of the Code commissioner and on March 12, 1907 (see page 386). There was not a mere removal of redundancies, not simply the clearing up of obscurities, but a material and substantial expansion of the terms of the previous act and of the act passed by the same legislature that adopted the manuscripts as the Code.

The rights such as are asserted in this condemnation petition, in so far at least as they concern properties *downstream* from the proposed original dam site of the power company, could not have been asserted by the power company under the provisions of any statute, actual or other-

wise, until the action of this joint committee undertook to engraft such rights upon the body of enacted laws. The insertion of the words "down-stream," we respectfully submit, was tantamount to the attempted enactment of new legislation. Certainly for the first time in Alabama the "revised" statute alone purported to give the right to go *down-stream* as well as *up-stream* in the search for property and property rights to be made the subject of condemnation.

It is to be presumed that when a law-making body considers a bill which contains but one subject of legislation and enacts such a bill into law the statute regularly enacted is to reflect the deliberate policy of the State with regard to the subject-matter. Under the facts at bar, however, we are asked to assume that the policy of Alabama concerning the extraordinary powers alleged to have been given to power companies is to be gathered from the form of an alleged enactment growing out of a bill constituted, by reference only, of manuscript sheets, the provisions whereof would, if considered as law, force the conclusion that the same legislature, within three months from the time when it regularly considered the subject of power companies and their rights, had undergone a complete change in viewpoint to such an extent that without deliberation or debate it had extended the powers of said companies in an unusual and almost unprecedented grant.

We respectfully submit that such an alleged enactment is no law at all; that the manner in which it was passed was a fraud upon the State of Alabama, was against common right and constitutional guaranties, and violated the rights of property safeguarded to the defendant corporations by the Constitution of the United States. It is not "due process," we respectfully submit, to proceed to take the property of one person for an alleged public use, under color of an alleged provision of a statute which never legally became any part of the State's written law.

These propositions are too self-evident to need the support of citations. We think, however, that it might be helpful to refer to a few of the authoritative recognitions of the doctrine that the due and orderly enactment of law is intimately and directly related to "due process."

> "Due process of law in the particular case means, such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes of cases to which the one in question belongs" (Cooley on "Constitutional Limitations"—7th ed.—page 506).
>
> "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it" (*Idem*, page 259, and cases cited).

This same eminent authority, Cooley, at page 186 of his great work on "Constitutional Limitations" (7th ed.), in treating of the importance and necessity for the enactment of laws by legislative bodies only in accordance with the modes prescribed in the constitution, which governs their deliberations, says:

> "For in such case not only is it important that the will of the law-makers be clearly expressed, but it is also essential that it be expressed in due form of law; since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential."

Mr. Lewis, in his work on "Eminent Domain" (3d ed.), section 409, page 738, applying this principle specifically to statutes giving the right of condemnation, says:

> "Statutes which provide for the exercise of the eminent-domain power must not only comply with the eminent-domain provisions of the constitution, but with those provisions which relate to the manner and form of the legislation or which otherwise limit the power of the legislature. * * * The statute must conform to the provision as to the title of acts and to all other provisions as to the manner of passing laws,"—citing a number of cases.

It follows, then, upon these principles, as an elementary principle of constitutional law, "that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." See Cooley, page 163, 7th ed.

Applying this principle, the Supreme Court of Oregon, in a case similar in some respects to the one at bar, held that the legislature cannot delegate to code commissioners the power to amend the laws of the State.

State *vs.* Gannt, 9 Pacific, page 55.

2.

The seventh assignment of error ought, we think, for convenience, to be considered at this point of the argument. This assignment embodies the contention that the petition for condemnation involved in this litigation is insufficient to confer jurisdiction and, therefore, does not afford due process of law, in that the purpose sought to be accomplished and subserved by said petition, to wit, the sale of power generated by water, is not a public purpose.

This presents a question of law that has never been expressly determined by this court.

Whether or not the use for which property is sought to be condemned is a public use is a question of law, and not of fact. (Lewis on "Eminent Domain" (3d ed.), section 251, vol. 1, page 497, and cases cited in note 8; London *vs.* Sample Lumber Company, 91 Ala., page 606; Sadler *vs.* Langham, 34 Ala., pages 311-326.)

Mr. Cooley, in his work on "Constitutional Limitations" (6th ed.), page 651 (7th ed.), page 764, says:

> "It is conceded on all hands that a legislature has no power, in any case, to take the property of one individual and pass it over to another, without reference to some use to which it is to be applied for the public benefit."

See also Lewis on "Eminent Domain," section 250.

N. Y., N. H. & H. R. R. Co. *vs.* Offield, 77 Conn., 417.

Amsperger *vs.* Crawford, 101 Md., 247.

In re Eureka Basin Co., 96 N. Y., 44.

In re Niagara Falls, etc., Co., 108 N. Y., 375.

In re Split Rock Cable Co., 128 N. Y., 408.

Healy Lumber Co. *vs.* Morris, 33 Wash., 490.

In re Tuthill, 163 N. Y., 133.

The Supreme Court of Alabama has adhered strictly to the doctrine that right of eminent domain must be exercised strictly within the bounds of the constitutional grant of power, and has declared several statutes of Alabama attempting to authorize the establishment of private rights across the lands of third persons and the condemnation of their lands for the erection of mill dams unconstitutional.

Sadler *vs.* Langham (*supra*).

Moore *vs.* Wright, 34 Ala., page 311.

Bottoms *vs.* Brewer, 54 Ala., 288.

McCulley *vs.* Cunningham, 96 Ala., 583.

The question to be determined involves the query as to whether a power company occupies any different or more favored position under the laws of Alabama than did the mills which were considered by the court in Sadler *vs.* Langham and Bottoms *vs.* Brewer (*supra*). That question necessitates a critical study and analysis of the statute. While, as we have before said, this court, so far as we are aware, has never decided the specific question as to whether the furnishing of power, generated by water, to the public is a business

of such a nature as to impress the works employed therefor with a public use, yet the question has been dealt with, in a general way, by the supreme courts of many of the several States, and it has been many times decided that such a use is a public use. A fairly comprehensive list of these decisions is collected and cited by Mr. Lewis in his work on "Eminent Domain" (3d ed.), paragraph 268, page 536. It will be found, however, upon an examination of these cases, that the particular statutes giving the right to condemn in aid of this purpose, judicially construed in these cases, were very different from the statute involved in this case. So far as our investigation goes the characterization of such use as a public use has been each time based upon facts and statutes involving merely the simple right to condemn for overflowage or to acquire the necessary land for the construction of transmission lines. Statutes which grant to power companies the right to condemn lands for overflowage manifestly confer the right and authority with respect to lands lying "up-stream" from the dam of the condemning power company. We have not been able to find a case where there was involved the construction of a statute giving the right of condemnation with respect to land and properties "down-stream" from the dam of the condemning power company and, therefore, concerning in no way the successful operation of the power manufactory if carried on and operated at its initial dam site. It is easy to understand how the courts have sustained the right of condemnation for such purposes over lands up-stream from the dam, because if the manufacture of power be a purpose in which the public is beneficially interested, it is manifestly interested in the instruments or physical things which are essential to the creation of the power, viz., a dam and the impounding of water which necessarily results from the erection thereof.

It is a matter of common knowledge that in the impounding of waters by dams lands of others may be, as a result, overflowed, and if it be conceded that the public is beneficially interested in the use of the power produced through

the plant of which the dam is a necessary appurtenance, the public is likewise sufficiently interested in the right to overflow lands of others to justify a statutory grant of power to this end, where the same is within constitutional limitations. It might reasonably be said, therefore, that such right to condemn is constitutionally justified upon the idea that the public is interested in the production of water-power, where avowedly created for public and not merely private distribution. This conclusion presupposes, however, a necessity for taking intimately and directly related to the successful operation of a plant in existence or in process of erection.

We think it will be found upon a careful examination that this is the most liberal construction possible to put on any of the decided cases, and it is evident that the instant case presents questions lying outside the scope of previous judicial determination.

In the first place, the statute here involved does not purport to grant the unqualified or unlimited right to condemn the plants of cotton factories below the initial dam site of the condemning party, but, on the contrary, section 4 of the act expressly denies such right, relative to any cotton factory, to condemn lands, hydraulic structures, water or water rights "at any point upon the same water-course in actual and prior use by it for the operation of its plant." Where it deals with cotton factories, section 4 of the statute gives the right to condemn only lands, hydraulic structures, water or water rights belonging to such factories "in excess of what is actually in use or may be used at normal stages of the stream, for the operation of its plant as already established at the time the condemnation proceeding is commenced." As a condition precedent to the exercise of any right of condemnation under these statutes, it must appear that such power companies as may seek to condemn thereunder have "acquired by purchase or otherwise than by condemnation a dam or power site comprising not less than one acre of land upon each and opposite sides of any water-course." The

query arises, therefore, whether this provision, limiting as it does the corporations of the favored class, does not indicate that the power sought to be conferred, being special and not general, is granted in aid of a private and not a public use. Otherwise, it logically would seem that the power should be conferred generally upon any corporation organized for the purpose of manufacturing, selling, and supplying to the public power produced by water as a motive force, and not confined in terms to a necessarily limited number of a class. That the proposed use is private rather than public is also indicated by the fact that no power is conferred for the condemnation of one acre of land on each and opposite sides of any water-course. The necessary acreage for the dam site must be acquired "by purchase or otherwise than by condemnation." This requirement negatives the idea that the use for which the water power is sought to be condemned is a public use; otherwise the acquisition of a site through a voluntary alienation would not be made a condition on the fulfillment of which depends the right to avail of the grant of power.

This indication of legislative intent is made even more significant if the construction put on the meaning of the statute by opposing counsel is sound. If the properties sought to be condemned under the statute need have no relation, physical or otherwise, to the initial dam site, then it becomes a certainty that the right to condemn for a public use could not be predicated upon such an arbitrary basic condition.

To illustrate, it is claimed that in this case the right of eminent domain exists because of the bare fact that a dam site has been acquired otherwise than by condemnation, etc. By reason of this fact alone petitioners are claiming to be distinguishable from other corporations of a similar nature and said for this reason to be vested with a generous proportion of sovereign power, although, as we have heretofore indicated, the record shows that the power company has not

built any dam at Cherokee Bluffs (its reputed dam site) and, therefore, has not created any power available for use by the people of Alabama. We have also shown that there is no way legally to compel it to build its dam site and thereby create a power which the people of Alabama could use. We have also pointed out that the works of the defendant corporations are located ten miles down stream from said Cherokee Bluffs, and that there is no possible physical relations between the two power sites.

We respectfully submit that none of the cases wherein it has been held that the furnishing of electricity to the public for light, heat or power is a public use in aid of which the power of eminent domain may be exercised are, under the facts in this case, helpful in the determination of the questions here presented. So far as our investigation goes this statute of Alabama is *sui generis* and is without a parallel in scope and in its provisions.

Judge De Greffenreid in his dissenting opinion (Record, page 41) took the view of the situation here presented, expressing himself as follows:

> "In my opinion this proposed condemnation of property ten miles below the proposed dam-site is shown by the pleadings to be totally unnecessary to the erection by the Interstate Power Company of its works and plants; has no connection with such erection, and until the power company sees proper to build its works and plants, no public necessity for the proposed condemnation can be shown. * * * In my opinion, the completion by the power company of its works and plants is a condition which must precede any such condemnation as is sought by this proceeding."

We respectfully submit it is impossible to escape the force of this reasoning, and if it be sound, it logically follows that the power company in this case is seeking to appropriate the property of the defendant corporations "without due process of law."

We deem it entirely proper to add that counsel for the power company, by their arguments in the courts below, apparently indicated their acquiescence in the construction of this remarkable statute herein set forth, viz., that it was impossible thereunder to condemn any natural unused excess of water over and above that furnished by the stream at the normal stages of the stream. Abandoning this idea, they pitched their case on the proposition that they did have the right—and their petition was properly brought to accomplish that purpose—to appropriate the excess of water *created* by the storage dam which they proposed to build at Cherokee Bluffs. Their final contention was that they were merely seeking to condemn the property of the defendant corporations in order to be able to utilize the created or artificial excess which they proposed to bring about by the erection of their dam.

It will be noticed that in the averments of the petition the allegation is nowhere made that any excess of lands existed, or that there was any excess of hydraulic structures. The excess sought to be condemned is merely an excess in water, which will, it is contended, be brought about by the addition to the normal stream of waters stored by the power company in the projected pond above the conjectural dam.

Boiled down, it may be said that the contention of the power company is that it has the corporate right to maintain a storage dam which will be the means of furnishing water to lower proprietors, and, having this right, the statute by implication confers the further right to use the water over again at any point down-stream wherever it can be made available, and that, having this latter right, the statute, by still further implication, confers the right to condemn the plant of lower proprietors to make use of the expected excess of water at the point available.

It will be noted it is the created excess water, the impounded water, and not an excess of water created by the stream at its normal stage, that is sought to be utilized.

Before the property of the defendant corporations could legally be condemned, so as to make it convenient for the power company to utilize the expected excess of waters of the stream, when and if augmented through the instrumentality of said dam, at this particular point, the statute must not only give the right to obstruct the stream by storing water, which will eventually pass down-stream for the use of lower proprietors (1 Lewis on "Eminent Domain," section 63), but must grant the specific right to condemn in aid of that proposed use.

The statute under consideration confers no such right. We have heretofore called attention to the cases (*supra*) which hold that no condemnation may ever be had unless it clearly appears that the condemnor is proceeding under a statute or law which clearly and unmistakably confers the right to condemnation. We again respectfully represent that this statute does not give the right to condemn an excess of water *artificially created* by a storage dam utilizing the same at a point the same is passing over the dam of the lower proprietors. Such an excess of water would not, we respectfully submit, be the kind of "excess" contemplated as condemnable within the meaning of the statute. The scope of the statute only seems to comprehend an "excess" of water not "actually in use or which may be used at normal stages of the stream." It seems clear to us that an "excess" created through a storage dam would produce "an abnormal excess of water" at the dam of the lower proprietor, and the statute clearly does not give the right to condemn any "abnormal excess," however produced.

In no event could the petition for condemnation be sustained in this case upon that theory, because, as we have several times stated, the power company has never erected any dam at any point, and no question of artificially created excess of water could properly be involved, because that kind of an excess is not in existence for condemnation. It seems equally clear that such a use of artificially created

water, viz., its reutilization down-stream or below the proposed works, can in no view of the case be construed as impressed with a public use, thereby investing the power company with the right to condemn the dam, the lands and the right of way thereto, and the railroad of the defendant corporations.

We have not deemed it necessary to cite this court to the law which governs and determines the relative rights of upper and lower proprietors in the running waters of a non-navigable stream, such law being well settled and elementary.

We respectfully submit on this branch of the argument, concerning the legality of the rights claimed by the power company in this case, that if it be finally held that it is lawfully entitled to exercise the same such a decision will have a tremendous significance and importance in the future determination of the law touching the conflicting rights of riparian owners. If such a statute as the one here involved be held not to violate the provisions of the Fourteenth Amendment, we respectfully submit that, once qualified by the ownership of one acre of ground on each side of the banks of a non-navigable stream, it would be possible for a power company to march from that point through all the windings of that particular river to its mouth, "sweeping the river clean of minor industries, enterprises, and long-established water companies, destroying public rights, wiping out ferries, flooding grist-mills, blighting cotton factories, and gathering into its all-powerful embrace lands, power, dam sites, factories, ferries, mills, public rights, bridges, and everything else which obstructs its march, except such specific species of private property as may be by the particular statute excepted."

3.

We have heretofore stated that in our opinion the first, second, third, and fourth assignments of error involve similar questions of law, although in different aspects, each of said

exceptions invoking the protection of rights guaranteed under the Fourteenth Amendment to the Constitution of the United States.

The first assignment is predicated upon the proposition that it is contrary to the Fourteenth Amendment for the legislature of a State to authorize a condemnation of property and property rights owned by a corporation, withholding such right when said property is owned by persons other than a corporation.

It seems quite clear that the latter part of section 3635 (*supra*), where cotton factories are dealt with, must be construed and have reference only to cotton "factories" corporation-owned, because the neutral "its" is employed wherever the plant of such factories is mentioned. The use of this pronoun would under all rules of construction restrict, we respectfully submit, the property, hydraulic structures, and water rights of cotton factories which can be condemned to only such as were owned by corporations.

We are familiar with the decisions of this and other courts in which it has been held that the legislature of a State has the right to make special provisions with regard to corporations which are not applicable to private individuals, although similarly situated (Berea College *vs.* Kentucky, 211 U. S., 45; St. Louis, I. M. R. R. Co. *vs.* Paul, 173 U. S., 404; Sinking Fund Case, 99 U. S., 700, 720; Knoxville Iron Co. *vs.* Harbison, 183 U. S., 13; N. Y. C. & H. R. Co. *vs.* Williams, 199 N. Y., 108; Lord *vs.* Equitable Life Assurance Society, 194 N. Y., 212; Holden *vs.* Hardy, 169 U. S., 366; Hatch *vs.* Reardon, 204 U. S., 154). This principle of law, however, has never been held applicable, so far as we are aware, to condemnation statutes. Moreover, from a careful reading of section 3635 (*supra*) it will be noticed that it is not the property of every cotton factory which is authorized to be condemned, but only that of cotton factories which possess "lands, hydraulic structures, water or water rights in excess of what is actually in use or may be used at normal stages of the stream after the opera-

tion of *its* plant is already established at the time the condemnation proceeding is commenced."

We respectfully submit that it is one thing for the courts to hold that it is legally possible to confer the right of condemnation against the property of corporations generally (leaving individually-owned property exempt from the operation of the statute), and quite another to go a step further and restrict the right only as against the property of particular corporations of a very restricted class. We have heretofore pointed out that this statute confers the right to condemn *upon* corporations of a very limited and peculiar class, and that that of itself indicates that the use to which the condemned property is to be put is not a public use.

But it is also equally clear that this statute restricts to an exceedingly limited class the corporations (*i. e.*, cotton factories owned by corporations possessing "lands, hydraulic structures, water or water rights in excess of what is actually in use or may be used at normal stages of the stream") whose property can be condemned. This is, we respectfully submit, a purely arbitrary classification of the kind of cotton-mill corporations whose property rights may be condemned and denies to such corporations the equal protection of the law guaranteed by the Fourteenth Amendment.

"Due process of law and the equal protection of the laws," this court has said, "are secured if the laws operate on all alike and do not subject the individual *to an arbitrary exercise* of the powers of government."

Duncan *vs.* Missouri, 152 U. S., 377, 382.

> "Classification must always rest upon some condition which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrary and without any such basis. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more impera-

tively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact that classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is only based upon some reasonable ground—some condition which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Gulf, Colorado & Santa Fe R. R. *vs.* Ellis, 165 U. S., 150, 155, 159, 160, 165.

See also Cooley, Constitutional Limitations (7th ed.), 561, *et seq.*

Cotting *vs.* Kansas City Stock Yards Co., 183 U. S., 79.

Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 540, 560, 561.

We not only raised this point last discussed in the first assignment of error, but also in the second and fourth assignments of error.

The third assignment raises the point that the defendants below were denied the protection of the Fourteenth Amendment, in that sections 3627-3637 of the Code of Alabama deny any right of appeal, prior to the assessment of damages, as will stay any such assessment, and as will enable said defendants to revise the judgment of the probate court granting the prayer of the petition of condemnation.

We have heretofore pointed out the marked difference relative to the right of appeal from the preliminary order of condemnation as allowed under section 1717 (*supra*) of the Code of 1896 of the State of Alabama and that allowed under section 2665 (*supra*) of the Code of 1907, and have shown that an appeal from the preliminary order of condemnation existed prior to the adoption of the Code of 1907.

We are familiar with the decisions of this court, that ordi-

narily the right of appeal is not a necessary incident of due process of law:

Andrews *vs.* Swartz, 156 U. S., 272.
McKane *vs.* Durston, 153 U. S., 684, 687.
Reetz *vs.* Michigan, 188 U. S., 508.
Hall *vs.* Johnson, 186 U. S., 480.

This principle, however, has never been applied, so far as we are aware, in a condemnation case. We respectfully submit they have no application to such cases. We do not have to cite authority to show that where the lands or property of a person are sought to be taken under the power of eminent domain, legally conferred, that the taking is, for all practical purposes, completed almost at the commencement of the proceedings; so that, legally speaking, it may be said that under such statutes execution issues in advance of judgment. The legislature of Alabama seemed to recognize this fact prior to the adoption of the Code of 1907, because under all prior condemnation statutes in that State the right of appeal from the preliminary judgment of condemnation was allowed. Under the statutes of Alabama (*supra*), whereby property may be condemned, for all practical purposes, there is no right of appeal whatsoever on the very important question whether the particular property sought to be condemned is subject to condemnation. The statutes provide that the moving party may take possession of the property under certain conditions after the commissioners have made their report (3882, *supra*). Section 3876 (*supra*) gives the applicant the right of entry as soon as the damages assessed by the commissioners are paid into court, and specifically provides that an appeal, if taken, shall not suspend the judgment. It is true that an appeal is allowed under these statutes, but evidently its purpose is limited to and can be employed only for the purpose of determining the amount of damages which should be allowed for the property taken. The question whether or not the property

should be or could be legally condemned at all seems to be settled and foreclosed as soon as the probate court takes jurisdiction. But even if we are wrong in this construction of these statutes and a right of appeal exists on all questions involved in the case it is yet clear that such right of appeal, if it exists at all, can only be exercised after the commissioners have made their report and the right of entry has accrued to the applicant. We respectfully submit that such right of appeal is practically no right at all, because, under the peculiar nature of a condemnation case, the defendant is practically remediless after the applicant has entered and taken the property. In the instant case, for example, the defendant corporations will be practically without redress or remedy after the plaintiff, the Alabama Interstate Power Company, has cut the opening in its dam, condemned its hydraulic structures, its lands and its railway, and has gone ahead and built its power plant below the dam of the defendant corporations. If, after all that was done, the Supreme Court of Alabama should hold that the Alabama Interstate Power Company, as a matter of law, had no right of condemnation at all, it is quite clear, we respectfully submit, that the property of the defendant corporations would have been taken without "*due* process" of law. So far as we are aware, this particular question has never been passed upon or decided by this honorable court. In all the cases where this court has held that the right of appeal is not a necessary incident of due process of law, the question arose in a situation where opportunity to assert every legal right had been allowed the losing party in the trial court of first instance. We can well understand how and why it has been held that the right of appeal is not a necessary incident of due process in cases where final judgment or sentence results only after a full trial or hearing where every right, primary or incidental, has been accorded the losing party. But we respectfully submit that these cases have no application to the situation which confronts the defendant in a condemnation case in

Alabama after the commissioners have made their award and the applicant has entered and taken the property. Under these statutes, judgment upon the all-important question of condemnation *vel non* is put beyond the power of the defendant to alter or change.

We respectfully submit that this amounts to a denial of due process of law.

The second and fourth assignments of error raise practically the same question. We have already pointed out that sections 3627-3637 and the eminent-domain statutes, sections 3860 *et seq.* (*supra*), of the Code of Alabama do not provide any adequate mode of assessing the damages to be allowed for the property or property rights taken. It is not necessary to further amplify this portion of the argument on that question.

We think we have demonstrated above that under the constitution of 1901 the probate courts of Alabama are utterly without jurisdiction in condemnation proceedings, and have shown that the circuit courts in Alabama are the only constitutional courts which have jurisdiction in such proceedings. The question arises, therefore, whether it is due process of law, within the meaning of the Fourteenth Amendment, to seek to deprive a person of property under a condemnation statute in a court wholly without jurisdiction to condemn the property. So far as we are aware, this question has never been decided by this court.

Mr. Cooley, in his work on Constitutional Limitations (7th ed.), page 760, citing numerous authorities in support of the text, says as follows:

> "Private property can only be taken pursuant to law; * * * When, however, action is had for this purpose there must be kept in view that general as well as reasonable and just rule, that, whenever in pursuance of law the property of an individual is to be divested by proceedings against his will, a strict

compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be unfair. This provision must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must show affirmatively such compliance."

In 2 Lewis on Eminent Domain (3d ed.), section 865:

"The power to force a man to give up property against his will and for a consideration fixed by others is one which is in its nature harsh and against common right. According to all analogies of the law, such a power, to be effectual in its exercise, must be strictly pursued."

"The right to appropriate private property to public use lies dormant in the State until legislative action is had, pointing out the occasion, the modes, conditions and agencies for its appropriation."

Richland School Township *vs.* Overmeyer, 164 Ind., 382.

In re Poughkeepsie Bridge Co., 108 N. Y., 483, 490.

We respectfully submit that it is a denial of "due process" to undertake to condemn property in a court wholly without jurisdiction of such proceedings, and because of the fact that the Supreme Court of Alabama authorized this case to proceed by reversing the judgment of the circuit court granting an alternative writ of prohibition the defendant corporations are about to be deprived of their property without due process of law. We respectfully submit jurisdiction of the court to proceed is essentially necessary in every instance in order to come within the requirements of "due process."

Finally, we think it proper to call the court's attention to the case of Weston *vs.* Charleston, 2 Peters, 449, in which it

was held that a judgment of a highest court of a State in a proceeding for a prohibition is a "final" judgment in a "suit" from which a writ of error will lie to this honorable court.

All of which is respectfully submitted.

H. N. RANDOLPH
(*Atlanta, Ga.*),
EDWIN G. BAETJER
(*Baltimore, Md.*),
Attorneys for Plaintiffs in Error.

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IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1915

No. 200

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY *et al.*, PLAINTIFFS IN ERROR,

vs.

ALABAMA INTERSTATE POWER COMPANY,

DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Alabama.

BRIEF FOR DEFENDANT IN ERROR ON THE MERITS.

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MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY *et al.*, PLAINTIFFS IN ERROR,

vs.

ALABAMA INTERSTATE POWER COMPANY,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF FOR DEFENDANT IN ERROR ON THE MERITS.

The Mount Vernon-Woodberry Cotton Duck Company, the Continental Trust Company, as Trustee; the International Trust Company, as Trustee; the Tallassee Falls Manufacturing Company, and the Consolidated Cotton Duck Company, filed a petition with the Circuit Judge of the Fifth Judicial Circuit of Alabama praying that a writ of prohibition issue to the Probate Court of Tallapoosa County, Alabama, and to the Judge thereof, restraining and prohibiting the said Probate Court and the Judge thereof from hearing or determining a certain petition or any part thereof or from making any further orders in the proceeding instituted in the said Probate Court by the Alabama Interstate Power Com-

pany, in which it sought to condemn certain property of the plaintiffs in error. (Record, pages 1-6.) The Circuit Judge granted the order and prohibited the Probate Court and the Judge thereof as prayed in the petition, and the Power Company was likewise prohibited from engaging in the trial of the case. (Record, page 15.) Thereupon the defendants in the writ appealed to the Supreme Court of Alabama from the order of the Circuit Judge prohibiting the trial of the condemnation proceeding and executed the necessary bonds to perfect such appeal under Section 2843 of the Code of Alabama of 1907. (Record pages 18-21.)

On the submission of this appeal in the Supreme Court the judgment or order of the Circuit Judge granting the alternative writ of prohibition was reversed and annulled and an order made dismissing the petition for the writ of prohibition. (65 So. Rep. 287.)

The defendant in error has filed its motion to dismiss the writ of error on the ground in substance that no final judgment is presented to this Court for review within the meaning of Section 237 of the Judicial Code and that no Federal question is presented, and has filed its brief in support of that motion.

Statement of the Case.

It appears from the condemnation petition filed May 25, 1912, that the Power Company, a corporation under the laws of Maine, had complied with the provisions of the Constitution and laws of Alabama required of foreign corporations in order to do business within that State; that it had by its charter the right to manufacture, supply and sell to the public power produced by water as a motive force, and was invested with all other powers, privileges, franchises and immunities required to carry such charter right into effect, including the right to construct and complete dams, power houses and works necessary and related thereto, and to dam and store water and to divert or otherwise use the same in the construction of its plants and the operation of its business; that it had acquired a dam site or power site consisting of lands upon each and opposite sides of the Tallapoosa river, a non-navigable water

course in the State of Alabama and was engaged in constructing and proposed to operate at that site and across that river a dam for the manufacture and supply of power produced by water as a motive force for the public; that the defendants in the petition, who are the pl..intiffs in error in this Court, owned and operated two cotton factories at points down stream from the hydraulic works of the Power Company, and that in connection with such cotton factories they had erected a dam across the Tallapoosa river together with certain hydraulic structures, by means of which they generated a limited amount of power produced by water from the river, greatly less than the capacity of the river, and thereby operated their cotton factories; that by reason of the erection of the dam of the Power Company upon and across the Tallapoosa river, the flow of the water would be greatly increased at certain seasons of the year, resulting in the creation of water power at the dam of plaintiffs in error largely in excess of what was then in actual use by them or might be used by them at normal stages of the river in the operation of their cotton factories as established at the time the condemnation proceeding was commenced; that the Power Company desired and sought by the condemnation petition to acquire certain described lands, water and water rights of the plaintiffs in error in excess of what was actually in use by them or might be used by them at normal stages of the river in the operation of their cotton factories as established at the time the proceeding was commenced, including lands on which to erect a power house and other hydraulic structures indicated on the sketch attached to the petition and marked Exhibit "A," (Record, page 13), together with the right to construct an opening in the dam for the purpose of causing such excess of water so created by the upstream dam of the Power Company to pass along and through the power house and hydraulic structures to be erected on the described land of the plaintiffs in error; and also the right to excavate the bed of the river to provide a tail-race below such land of plaintiffs in error and the water flowing down the river over the dam of the plaintiffs in error and the right to use the same in the generation of electricity for sale to the public in excess of what

was actually in use by the plaintiffs in error or might be used by them at normal stages of the stream with their hydraulic structures as established at the time the condemnation proceeding was commenced; and the petition also described a certain spur railroad track running to the cotton factories described in the petition, and the right was sought to use the said tracks in the transportation of freight and material needed in the construction of the hydraulic works of the condemnor, and rights of way were sought with the view of continuing the railroad tracks to the power house site, for construction purposes and for the operation of towers and poles, and the stringing of electric wires thereon. Paragraph 8 of the petition set out the use to which the condemned property would be devoted in this language:

> "8. And your petitioner further avers that it seeks to acquire the lands, easements, hydraulic structures, water, and water rights described in this application, to be used by it in the manufacture, supply and sale to the public of power produced by water as a motive force, the better to enable it to perform its duty to the public as a public service corporation; and your petitioner does now expressly recognize the duty and obligation to the public imposed upon it by the laws of Alabama to manufacture, supply, and sell to the public electric current which will be produced by it by means of the use of the properties sought herein to be acquired by it, as well as by means of the use of the properties already owned by it, as described in paragraph five of this petition."—(Record, page 11.)

The petition then prayed for an order appointing a day for the hearing; for notice to issue to the various defendants, and for such orders and decrees as should be proper to the end of acquiring the property and rights described in the petition. (Record, pages 7-11). On the same day, May 25, 1912, an order was made by the Court taking jurisdiction of the application and appointing the 24th of June, 1912, for the hearing, and directing notice to issue

to the various defendants as prayed in the petition. (Record, pages 13-14.)

On the 21st day of June, 1912, and before the trial of any question involved in the condemnation proceeding, the petition was presented to the Circuit Judge praying for the rule *nisi* to prohibit the trial, the rule was granted and the trial was stayed, with the results before set out, and no order was made in the Probate Court except the order of May 25, 1912.

When the cause reached the Supreme Court on the appeal from the order of the Circuit Judge granting the rule *nisi*, it was submitted along with two other cases between the same parties, the records in which are not before this Court, and an opinion rendered disposing of the several cases.

The facts of the two cases which are not set forth in the record forwarded to this Court are shown in the opinion (Record, page 34). It may be stated, however, that cause numbered 472 on the Supreme Court docket was between the same parties, and was an injunctive proceeding instituted by the Mount Vernon-Woodberry Company and others against the Power Company and others to restrain the trial of the condemnation proceeding upon the theory that the appeal from the order of the Circuit Judge granting the rule *nisi* was not effective. A demurrer was sustained to this bill by the lower court for want of equity, and an appeal was taken therefrom to the Supreme Court and that decree was affirmed (Record, page 34). Pending the controversy between the parties, it further appears that the Power Company filed its bill in Third Division, No. 23, against the Tallassee Company and others seeking injunctive process to restrain threatened interference with a preliminary survey of the property sought to be condemned as authorized by section 3493 of the Code of 1907. The lower court sustained the bill and from the decree there was an appeal to the Supreme Court, resulting in an affirmance of that decree. (Record, page 34.)

The assignments of error may be summarized as follows:

(First) The statutes of Alabama, consisting of sections 3627 to 3637 of the Code, which confer the right of condemnation claimed by the defendant in error, are unconstitutional as opposed to the Fourteenth Amendment in that they deny to the plaintiffs in error the equal protection of the laws by authorizing the condemnation of property and property rights when owned by a corporation, and withhold such condemnation when owned by persons other than a corporation;

(Second) That the aforesaid statutes are unconstitutional under the Fourteenth Amendment in that the condemnation will deprive the plaintiffs in error of their property without the due process of law;

(Third) That the aforesaid statutes are unconstitutional under the Fourteenth Amendment in that they deny to the plaintiffs in error any such right of appeal prior to the assessment of damages as will stay the assessment and as will enable the plaintiffs in error to revise the judgment of the Probate Court granting the prayer of the petition;

(Fourth) That the statutes of Alabama provide no adequate mode of assessing the damages, and therefore the statutes deprive the plaintiffs in error of due process of law contrary to the Fourteenth Amendment;

(Fifth) That the aforesaid statutes, under the construction given them by the Supreme Court of Alabama, are against common right and are therefore violative of rights of property guaranteed by the Constitution of the United States;

(Sixth) That the aforesaid statutes are void in that they are a fraud upon the State of Alabama and the United States, in that they authorize the erection of dams upon water courses in Ala-

bama without the consent of the United States and without compensation either to the State or the United States;

(Seventh) That the petition is insufficient to confer jurisdiction and does not afford due process of law in that the purpose sought to be accomplished and served, to-wit: the sale of power generated by water, is not a public purpose.

The subject of eminent domain is dealt with in sections 23 and 235 of the Constitution of Alabama of 1901, and the right of condemnation involved in this case is conferred by sections 3627 to 3637 of the Code of Alabama of 1907, and the procedure for condemnation under those sections is contained in Article 1 of Chapter 79 of the same Code, all of which are contained in an appendix to this brief.

Argument.

We think it proper to state the purpose sought to be accomplished by the condemnation proceeding. The defendant in error contended in the lower courts, and now contends, that it has the right to acquire by condemnation all such property of the plaintiffs in error as may be necessary to enable it to use for the benefit of the public the water power of Tallassee Falls included in the clause in italics in the following provision of the aforesaid section 3627 of the Code of 1907:

> " . . . Nor shall such corporation have the right to condemn the lands, hydraulic structures, water, or water rights of any cotton factory, at any point upon the same water course, in actual and prior use by it for the operation of its plant; *but may condemn the lands, hydraulic structures, water, or water rights of such cotton factory in excess of what is actually in use, or may be used at normal stages of the stream, for the operation of its plant as already established at the time the condemnation proceeding is commenced* . . . . In all cases just compensation shall first be paid to the owner in the manner provided by law for all property taken."

Since the year 1819 Alabama has had laws authorizing the condemnation of property for public use. The first instance of the exercise of such rights was under what are commonly called the Mill Dam Statutes, now constituting sections 3888 *et seq.* of the Code of Alabama of 1907, which vary but little from the earlier statutes. For many years there was occasion to employ them probably more than any other condemnation system in Alabama. There then appeared statutes authorizing railroad and other companies to condemn property for rights of way and other public purposes.

The Mill Dam Statutes were enacted at a time when electric development was unknown, and when there was little appreciation of the possibilities of water powers. Their exercise was in the main confined to small streams for the purpose of creating power to operate grist mills and other public mills. This system constituted the only method of acquiring such rights upon the streams of this State until 1903. Interest was then being taken in the electric possibilities of such developments and by the act of October 6, 1903 (General Acts, 1903, page 391), the mill dam system was enlarged and its provisions extended to include plants to generate electricity by water power to be operated for the public, (Section 3888 of the Code of 1907), but was confined to non-navigable streams.

At the same session of the Alabama Legislature an act was also passed conferring additional rights and powers on both domestic and foreign companies to acquire lands and other rights with the view of manufacturing, supplying and selling to the public power produced by water as a motive force (General Acts, 1903, page 365 *et seq.*). By the act of March 12, 1907 (General Acts, Alabama, 1907, page 439 *et seq.*), the act of October 1, 1903, was amended and its provisions enlarged, and the system was further revised by the Code Committee of 1907, and as thus revised the system is contained in sections 3627-3637 of the Code of 1907.

It is commin knowledge that the water powers of Alabama are of great importance and with few exceptions exceed those of any

State in the Union, and are shown by the report of Corporation Commissioner Herbert Knox Smith to the President of March 4, 1912, page 55, to be capable of developing at least 1,132,000 horsepower. These powers are found both upon the navigable and non-navigable streams of the State.

With the powers of the rivers going to waste, and with the industrial demand constantly increasing for electric power, the laws of Alabama have been amended from time to time, as we have pointed out, authorizing and encouraging such development. To further emphasize the demand of the people of Alabama for the development of the unused water powers an act was approved on July 27, 1907, entitled, "An Act to encourage the development of the various unused water powers in this State by exemptions from taxation for a period of ten years." (General Acts, Alabama, 1907, page 520), which now constitutes section 2069 of the Code of 1907, as follows:

> "2069. *Water Powers Exempt From Taxation.*—To encourage the development of the various unused water powers of this State, the plants, and the property, business, and franchises, necesary for the production, transformation, and distribution of electric current, of any person, or firm, or of any corporation, organized for the purpose of developing hydro-electric power for the use of the public, shall, in consideration of the benefits to be derived by the public from the development and operation of such properties and plants, be exempt from State, county, and municipal property and privilege taxation of all description, either under general or local laws, until ten years after the beginning of the construction of any such plant. Nothing in this section shall be so construed as to exempt from taxation the lands upon which such plants are erected; nor shall this section be so construed as to exempt from taxation any of the property, business, or franchises of any hydro-electric power plant already developed."

These statutes, therefore, evidence clearly the policy of the State of Alabama to encourage the full development of the water

powers of the State by extending certain privileges and powers deemed by the lawmakers necesary for that purpose. With this declared policy as an inducement to make the developments and an assurance of definite contract and statutory rights and powers, the development here involved was begun shortly before the filing of the condemnation proceeding.

Prior to the discovery of electrical transmission of power over long distances, water power could be utilized only at the power sites. This limited its development in most cases to comparatively small units and almost exclusively for manufacturing enterprises. The introduction of electric power transmission not only provided the means of supplying distant manufacturing and domestic demands, but also opened up an entirely new power field, viz.: the operation of street railways and lighting plants, thus reaching the individual consumer as well as the large user, and enormously increased the relative importance of water power.

The following are the cases in Alabama, in addition to the case at bar, which have construed and applied the system of laws we are considering:

State *ex rel.* Attorney General *vs.* Alabama Power Co., 176 Ala. 620; 58 So. 462;
Alabama Power Co. *vs.* Carden, 66 So. 596;
Alabama Power Co. *vs.* Hilyer, 67 So. 720;
Alabama Power Co. *vs.* Keystone Lime Co., 67 So. 833;
Alabama Power Co. *vs.* Adams, 67 So. 838.

Sections 3627 *et seq.* of the Code were intended to work out a complete and entire system to the end of developing the water powers of the State. The lower court sustained this view, holding that

"The clear intent appears to be to allow the conception and effectuation of a large, maybe colossal, plan for the reduction to practical, serviceable energy the water power that skilled manipulation and control may extract from, or secondarily

create upon, water courses in Alabama. The initial, major instrumentality for the accumulation, the condensation, as it were, of the latent, undeveloped water power must be the dam specified in the first paragraph of the statute. But the lawmakers, as we understand the statute, did not intend that the application of the *power* so created or accumulated should serve but *once* the public purpose to which it might be devoted. They contemplated, and to that end so provided that a power so, in a sense, created and so reduced to control should serve to generate a motive force so long as it might be subjected to extraction and transmission or translation as a component part of the scheme of which the dam, affording the impounding from which the accumulated power results, is the 'head.' Hence, it is in accord with this large conception , and authority conferred by, the statute that, down-stream, the entity the statute describes, and which conforms thereto in respect of the initial dam, should not be limited in the effectuation of its single conception and enterprise to the neighborhood of the *dam*, in order that a power so created and accumulated should yield its full, unexhausted utility and energy to the public service to which the grant necessarily consecrates it." (Record, page 31.)

The Remedy by Prohibition.

The opposing counsel insist that the writ of prohibition lies to restrain the unlawful exercise of judicial functions by inferior tribunals, and cite a number of cases to that effect in the Supreme Court of Alabama, as well as various provisions of its Constitution. The general rule thus laid down may be correct. Indeed, the lower court recognizes this doctrine in the case at bar, for after holding the statutes constitutional, said that:

"No doubt is entertained that the jurisdiction of the Probate Court of Tallapoosa County was invoked by that petition." (Record, page 34.)

And further:

> "Since the writ of prohibition can legally only issue to prevent a usurpation of jurisdiction or an excession of jurisdiction the alternative writ of prohibition issued by the Judge of the Fifth Circuit was improvidently issued." (Record page 35.)

Counsel then cite provisions of the Constitution of Alabama relating to the judicial department of the State with the view, it seems, of insisting in this Court that the Probate Court where the present proceeding was initiated is by the State Constitution confined to jurisdiction of orphans' business with power to grant letters testamentary and of administration, and that its powers may not be increased beyond those expressly specified; that there is nothing in the Constitution of the State which gives to the Probate Court jurisdiction over condemnation proceedings; that such jurisdiction is vested in the Circuit Court, and any attempt to take from that court the jurisdiction thus vested is in violation of the Constitution. This contention was made at length before the Supreme Court of Alabama, and while that court did not specifically notice this point, it did dispose of all constitutional objections in the broad statement, that the statute offended no provision of the State or Federal Consitution. (R. p. 33.)

Notwithstanding this holding, the counsel for the plaintiffs in error now insist that this court should review the question, which is strictly local.

Respecting the construction of a State statute by the State court, this language was used by Mr. Justice Holmes in Strickley *vs.* Highland Boy Gold Mining Co., 200 U. S. 527:

> "In view of the decision of the State Court, we assume that the condemnation was authorized by the State laws, subject only to the question whether those laws, as construed, are consistent with the Fourteenth Amendment. Some objections to this view were mentioned, but they are not open. If the

statutes are constitutional as construed, we follow the construction of the State court."

Many of the questions therefore which are suggested by the assignments of error, as well as by the brief for the plaintiffs in error, are disposed of by the foregoing rule, and this is likewise true of the position taken by the opposing counsel respecting the validity of the condemnation statutes under the Constitution of Alabama, for as said by this Court in Rasmussen *vs.* Idaho, 181 U. S. 198:

> "The judgment of the Supreme Court of Idaho establishes that there is no conflict between this legislation and the Constitution of the State, and it is not within the province of this Court to review that question."

It was also said by this Court in the case of United States *vs.* Jones, 109 U. S. 513, that

> "When the use to which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority."

Not only is the question strictly local as indicated in the foregoing cases, but counsel are mistaken in stating that the question is *res integra* in the courts of Alabama. Statutes conferring such jurisdiction upon the probate courts have been in force in Alabama since the admission of the State in 1819, with little change in this respect in the constitutions which have from time to time been in force. Thousands of judgments, civil and criminal, involving the exercise of judicial power by such courts have been rendered in that period, which would be invalid if there were any merit in this insistence. In the case of New Orleans, Mobile & Texas, etc., Co. *vs.* Southern & Atlantic Telegraph Co., 53 Ala. 211 (1875), it was contended that the eminent domain statutes which conferred jurisdiction on the probate courts were void for the very reason suggested by the plaintiffs in error. But that court in an opinion

of some length considered the history of the court of probate from the earliest days and denied the contention. The provisions of the Constitution of 1867, in force when that case was decided, and of the succeeding Constitutions of 1875 and 1901, are almost identical with respect to this subject.

It was likewise held in the case of State *ex rel.* Vandiver *vs.* Burke, 175 Ala. 56, 57 So. 870 (1912), that the constitutional provision cited by opposing counsel authorized the legislature to impose on probate judges and the probate courts powers of a judicial nature. The two cases just cited upon this question leave no doubt as to the proper construction of the State Constitution, if indeed the question is one which will here be considered at all.

Construction of Eminent Domain Statutes.

It is further insisted that under section 23 of the Constitution of Alabama of 1901 there can be no condemnation of property save for rights of way. This question was also argued at length orally and in brief by opposing counsel before the Supreme Court of Alabama. The peculiar language respecting rights of way, which is contained in section 23 of the Constitution, was inserted for the purpose of enabling persons and corporations to acquire rights of way for private use by impliedly declaring the same to be a public use. The Supreme Court of Alabama examined the similar section of the Constitution of 1875 at length in the case of Steele *vs.* County Commissioners, 83 Ala. 304, and laid down the well-known doctrine that the Constitution did not assume to confer the power of eminent domain, and that the purpose of the section in question was unmistakable, and was introduced to secure the right of way to persons and corporations in the manner suggested above, and that "the proviso in the section of the Constitution serves the natural and appropriate office of restraining or qualifying the preceding general provisions; and its operation is to except the right of way over the lands of persons and corpora-

tions from the general prohibition against taking private property for private use, by impliedly declaring the same to be a public use." This decision is a full and complete explanation of the provision of the Constitution. At no time before or since has it been seriously suggested in the courts of Alabama that the clause had any other purpose than here outlined. Indeed, the very theory on which the right of eminent domain rests is opposed to the proposition for which opposing counsel contend. As pointed out by the court in that case:—

> "The right of eminent domain antedates constitutions, and is an incident of sovereignty inherent in and belonging to every sovereign state."

The like doctrine was laid down by this court in United States *vs.* Jones, 109 U. S. 513, and in Searl *vs.* Lake Co. School Dist. 133 U. S. 553.

It is also insisted that the statutes do not provide a method for estimating the value of such property and the damages to the remaining property of the plaintiffs in error. All such questions necessarily enter into and constitute the basis of *just compensation* to which the owner of *property* is entitled before it can be taken for public use. In arriving at the value of such property the jury must consider the various elements suggested by the appellant. As said by the Supreme Court of Alabama in Alabama Central R. Co. *vs.* Musgrove, 169 Ala. 424, 53 So. 1009:

> "In respect to damages which should be awarded in this character of proceedings, 'just compensation' is the prime question of consideration, the one to be always held in view. —Commonwealth, etc., *vs.* Street, 116 Ala. 28, 22 South. 629; Hooper *vs.* S. M. R. R. Co., 69 Ala. 529. According to this rule, not only the value of the land actually taken should be estimated, but injury, if any, to the remaining parts."

And it was said by this Court in United States *vs.* Gettysburg Elec. R. Co., 160 U. S. 668, that, "As to the effect of the taking

upon the land remaining, that is more a question of the amount of the compensation. If the part taken by the Government is essential to enable the railroad corporation to perform its functions, or if the value of the remaining propery is impaired, such facts might enter into the question of the amount of the compensation to be awarded."

All of the elements which thus enter into the value of the property to be taken are embraced within the term "just compensation." (Searl *vs.* School District, 133 U. S. 553; United States *vs.* Chandler Dunbar, etc., Co., 229 U. S. 53; City of New York *vs.* Sage, U. S. Adv. Op. 1915, page 25.) Every case involving the exercise of the right of eminent domain represents in some degree new elements for which that broad and comprehensive term affords protection to the owner. It would be impossible for the legislature to define the elements which enter into just compensation, or to prescribe a basis for determining values, lest by so doing it should omit other elements which would possibly subject the statute to constitutional attack. As said by the court in United States *vs.* Chandler Dunbar, etc., Co., *supra,* quoting from Mississippi, etc., Co. *vs.* Patterson, 98 U. S. 403:

> "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule."

It follows, then, that no better rule can be prescribed than that the owner of the property must receive just compensation. (Alabama Power Co. *vs.* Carden, 66 So. 596; McEachin *vs.* City of Tuscaloosa, 164 Ala. 263). Moreover in the case at bar the Supreme Court pointed out that "The statute has defined the subjects of condemnation. These subjects of condemnation were, all must admit, fully known to the legislature. . . . It is not contended, and could not be, that so far as the courts are concerned lands, hydraulic structures, water, and water rights belong

to the wholly intangible, to the realm of the unknown; for the lawmakers within their province have enacted to the contrary. . . . The taking of property or easements under eminent domain presupposes the deprivation of the owner in the essential provision for compensation, and the theory, confirmed in the law, embraces the idea that for such deprivation the compensation awarded makes the owner whole." (Record, pages 32-33).

It is then insisted that the condemnation system is void because no method of condemnation is provided, and therefore the Probate Court had no jurisdiction to proceed in the case. This, however, is contrary to the facts. By section 3637 of the Code it is provided that the procedure for condemnation to obtain such rights shall be in the manner provided in Article 1, Chapter 79, or as provided by any other statute conferring the power of eminent domain upon public utility corporations, and the court below in the case at bar sustained that system of laws against every attack made by the opposing counsel.

Sufficiency of Petition.

It is also contended that the petition was insufficient because of certain averments relative to the excess of water, and other property rights sought to be condemned, and because the Power Company *proposed to impound water in the wet seasons to be furnished to the plaintiffs in error in the dry seasons,* which was not a public purpose. As respects the sufficiency of the petition the Supreme Court said:

> "If the petition is insufficient, and does not alone describe as subjects of condemnation property or easements that cannot, under any circumstances, be condemned, the petition should be tested by motion or demurrer. And we may add at this point that a good part of the argument submitted on these appeals could only have bearing or effect upon issues raised by appropriate motion or demurrer addressed to a petition to condemn." (Record, page 32.)

And as respects the purpose of furnishing water to the plaintiffs in error, the opposing counsel entirely misconstrue the petition and its purpose. Like suggestions were made in the lower court. Of course, the petition had no such purpose, but to the contrary sought only to obtain the use of the water at the dam of the plaintiffs in error in *excess of that used or which might be used by them at the time and in the manner aforesaid.* Furnishing water to the lower proprietors may or may not be a public purpose—a question which is not of interest in this proceeding, for it has nothing to do with the manufacture, supply and sale of power produced by water as a motive force, which was and is the end sought by the petition.

The Supreme Court of Alabama understood, and correctly construed the petition, if indeed there could be any misapprehension of its meaning.

It is further contended that the petition was void because there was an absence of any averment that the property sought was *necessary* in the accomplishment of the purposes named in the statute. This was also contended in the lower court. There is no provision of section 3627, or of any other statute of Alabama, which requires this to be done. To the contrary, the right is conferred to condemn all land likely or liable to be flooded or damaged. The statute uses the word *necessary* in several places, but only in the sense of being convenient or related or incident to the end desired, and nowhere does it use that word in connection with the acquisition of flooded lands or the rights here involved. Nor is there any principle of the law of eminent domain which only enables the property of a *private* corporation which is devoted to a *private* use to be condemned by a public service corporation when the property is *necessary*. The case of Anniston etc., R. Co. *vs.* Jacksonville, etc., R. Co., 82 Ala. 297, deals only with the right of one public service corporation to condemn the property of another such company. It is most remarkable indeed for the plaintiffs in error to contend so repeatedly that their property is devoted to a *public use*, as that term is considered and understood in the statutes and by the courts.

The clause of section 3627 of the Code cited by oppos-

ing counsel, which saves from condemnation certain property of *power companies,* has nothing whatever to do with this case. The plaintiffs in error were not shown to be power companies, but private industrial companies operating a private property for a private use, whereas a *power company* holds and uses its property for and in the interest of the public. It owes a duty at all times to serve the public, and in that respect differs from the cotton factory. It cannot, therefore, be said that the right of the plaintiffs in error to use the water to generate electricity *for a private purpose* of equal dignity with the right of the power company to use the water for a public purpose, for the very apparent and all sufficient reason that the plaintiffs in error were using the power, and only had the charter right to use the power, in furtherance of a private use, as distinguished from the public use to which the defendant in error will devote the property. In no sense, therefore, can it be said that the use of the property by the parties to this suit is in any way similar, as the opposing counsel contend.

The plaintiffs in error also insist that the condemnation sought by the petition is prohibited in terms by section 3867 of the Code. In this, however, counsel are much mistaken. The section provides that if the property sought to be condemned, has already been subjected to a *public* use, it cannot be taken for another and different character of public use unless an actual necessity for such lands or interest be alleged and proven, and unless it be alleged and proven that such other and different character of *public* use will not materially interfere with the *public* use to which the property is devoted. The plaintiffs in error state with apparent seriousness that the property described in the petition is actually being now devoted to a public use, in that the cotton factories described therein are being operated with the water impounded by the dam. Where, we ask, does the public use arise? There is no statute or principle of the law by which any court or legislative body may require a *cotton factory* to sell at reasonable prices, or to sell to all the public alike in the order in which requests or demands are made for its goods, and were such a statute to be enacted it could

not be upheld because such property is not impressed with a public use. This section of the Code deals only with that species of property which is used for and in the interest of the public—that is, impressed with a public use. There is nothing whatever in the pleading to show that the property of the plaintiffs in error is devoted to a public use. It is also contended that the operation of the cotton factory is as much a public use as the sale of power; that the statute authorizes the organization of corporations for the operation of cotton factories, and therefore that the property is devoted to a public use. Of course there is no reason or foundation in law or in fact for the statement that a cotton factory devotes its property to a public use, and the mere fact that private corporations may be organized under the general laws in no sense impresses their property with a public use. There is no statute which authorizes cotton factories to exercise the right of eminent domain, except possibly for a right of way under section 3500 of the Code.

Section 3888 of the Code is also cited by plaintiffs in error in support of this position. The statute provides that a dam for a grist mill, saw mill, gin, factory or plant to generate electricity by water power *to be operated for the public*, may be erected across any non-navigable water course. The Supreme Court of Alabama expressly held in McCulley *vs.* Cunningham, 96 Ala. 583, that an application under this statute was void because it did not allege that the mill would be operated for the public. To quote the language of that decision:

> "The right conferrd by the statute is the exercise of the power of eminent domain and involves the taking of private property, as much as if lands were taken. Under the limitations of the Constitution, no such right can be exercised unless the mill or other structure specified in the statute is to be operated for the public, under regulations established by law; and section 3184 of the Code in express terms limits the exercise of the right to mills, gins and factories to be so operated."

So that no statute of Alabama has declared a cotton factory to

be engaged in a public service, and it may be gravely doubted whether such statute could be lawfully enacted by the Legislature of that State.

It is further insisted that the condemnaion petition did not sufficiently describe the upstream dam site of the Power Company. This may be true without in any wise affecting the petition at this stage of the case, and certainly affords no basis for injecting a Federal question into the case.

Statutes Properly Enacted.

The opposing counsel seem to rest their Federal questions in the main on the contention that the Legislature did not enact the statutes in question in accordance with the constitutional requirements of Alabama. Counsel set out the statute of September 30, 1903 providing for the appointment of a Code commissioner, and the act of February 15, 1907, creating a joint legislative committee to examine the Code prepared by the commissioner, and contend that this committee had no authority to change the phraseology of existing laws, although the same Legislature by the act of July 27, 1907, expressly adopted the work of the Code Commissioner, the Honorable James J. Mayfield, as "revised, amended, corrected and reported by the joint committee of the two houses of the Legislature." The Code thus adopted was described and identified in the act of the Legislature, but the opposing counsel contend that at no time did the Legislature give authority to enact new laws into the Code under the guise of working out a codification of existing laws. And thus by an ingenious argument the opposing counsel would read into the case a denial of due process of law because the right sought by the defendant in error is based on section 3627 of the Code as revised by the joint Code committee. All of this is foreign to a review in this Court of the judgment of the Supreme Court of Alabama. Every contention to which we have referred was made before that court and disposed of.

Moreover, by the act of the Legislature of Alabama approved August 26, 1909, the Code of Laws of 1907 was again adopted, which act is in this language:

"AN ACT to adopt a Code. Be it enacted by the Legislature of Alabama:

"SECTION 1. That the printed volumes published by authority of law in 1907, known as the political, civil, and criminal codes, containing sections 1 to 7900 both inclusive, together with the rules of practice of the courts, be and the same are hereby adopted as the Code of Alabama.

"SECTION 11. That all acts of the Legislature, passed at the special sessions of the Legislature, altering, amending or repealing either the sections of the Code, or the acts of the Legislature passed at the general or special sessions are unaffected by the adoption of this Code." (General Acts, Alabama, Special Session, 1909, page 174.)

In the following cases the Supreme Court of Alabama referred to this act, and held that it readopted the Code of Laws as contained in the three printed volumes without reference to the Act of July 27, 1907:

Fulton *vs.* State, 171 Ala. 572, 54 So. 688;
Montgomery *vs.* Wyche, 169 Ala. 181, 53 So. 786;

Although the act of July 27, 1907, was quite sufficient to adopt the Code, as the Supreme Court of Alabama held in State *vs.* Lamar, 178 Ala. 77; 59 So. 473.

Certainly it is far fetched to say that due process is denied because a suitor asserts a right under a statute thus enacted.

Moreover, as held by this court in Leeper *vs.* Texas, 139 U. S. 462, "Whether statutes of a Legislature of a State have been duly enacted in accordance with the requirements of the Constitution of such State is not a Federal question, and the decision of State courts as to what are the laws of the State is binding upon the courts of the United States." See also Duncan *vs.* McCall, 139 U. S. 449; Long Island etc. Co. *vs.* Brooklyn, 166 U. S. 685; Smith *vs.* Jennings, 206 U. S. 276.

It is insisted that the statute authorizes the condemnation of the property of cotton factories when owned by corporations and withholds such condemnation when owned by others. But the statute is not subject to this construction for the right is conferred to condemn the property of any cotton factory in excess of what is actually in use or may be used for the operation of its plant as established at the time the proceeding is commenced.

The same insistence was made in the Supreme Court of Alabama. While that Court did not in terms dispose of this objection, yet it was doubtless apparent to that Court, as it is to this Court, that the property described in the statute of any cotton factory, whether owned by individuals, firms or corporations, is subject to condemnation. It would indeed be far reaching to hold that this language only has to do with such property of corporations, and therefore that the statute is invalid. The statute does not even admit of such a construction. Its terms are broad and comprehensive. It is the *property of the cotton factories* which is the subject of condemnation. Even if the statute admitted of the construction suggested by the opposing counsel, it has not been so construed by the Alabama Supreme Court, for that Court held that it offends no provision of the Constitution, State or Federal, and therefore it does not remain for this Court to read into the statute a construction with the result to attend that the statute is void for discrimination.

Legislature May Classify Subjects of Condemnation.

The statute is not subject to question because the property of cotton factories is subject to condemnation. The Legislature might have authorized the condemnation entirely of such properties as was held by the Supreme Court of Alabama, but in its uncontrolled discretion the Legislature saw fit to authorize the condemnation only of the property and rights in excess of what was in actual use, or might be used, at the time and in the manner set forth in the statute, all to the end that the entire flow of the stream might be used in generating electric current for the public use. Such action, however, of the Legislature was *ex gratia,* not *ex necessitate.*

It was pointed out by this Court in Shoemaker *vs.* United States, 147 U. S. 282, that while the courts have power to determine whether the use is a public one, "yet if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation shall be made."

Nor is the statute subject to question because a distinction is made between the property of cotton factories and of power companies, which may be condemned. Within certain limits the property of power companies may be condemned so that such properties are not treated differently. But assuming no such right of condemnation to exist as to the property of power companies, there is, we submit, ample reason in this distinction. The power company devotes its property to a *public* use. The cotton factory devotes its property to a *private* use, and there need be no general act authorizing the condemnation of all property of every kind, whether devoted to a public use or not. The right of the Legislature to distinguish, select and classify objects of legislation has been repeatedly sustained, with the qualification, of course, that the classification should be made upon some reasonable ground and not a mere arbitrary selection.

Magoun *vs.* Ill. T. & S. Bank, 170 U. S. 283;
Mo. etc. Co. *vs.* May, 194 U. S. 267.

Right of Appeal Afforded by Statute.

It is also insisted that no appeal lies from the action of the commissioners in assessing the damages. As the Court will observe from the statutes the proceeding is begun by a petition or application in writing to the court of probate of the county in which the lands are situated, setting forth the uses or purposes for which the lands are to be taken, the interest therein, and a description thereof, with the names and residences of the owners, and thereupon the court is required to make an order appointing a day for

the hearing, and must issue notice to the owners resident in the State, which must be served at least ten days before the hearing, and provision is made for notice to non-residents by advertisement in a newspaper published in the county, or if none be published therein, by posting notice at the courthouse door and three other public places, for at least three weeks before the day appointed for the hearing. It is then provided by Section 3865 that on the day appointed, or on the day to which the hearing may be continued, the Court must hear the application and any objections thereto, and any legal evidence touching the same, and shall make an order granting or refusing the application. If the application is granted, the judge is required to appoint three disinterested commisioners, a majority of whom are required to assess the damages and compensation of the owners, and the commissioners are required to report in writing to the Court stating the amount of the damages and compensation ascertained and assessed by them to the owners of the land within twenty days from their appointment, whereupon the Court is required to make an order of condemnation in pursuance of the application, upon the payment of the damages and compensation so assessed. It is expressly provided that any person interested in the proceeding may be present in person or by attorney at any of such proceedings or trials. Thus there is a complete system for hearing the application, after due notice to all interested parties. No objection can be taken to this system from any point of view.

It is next provided, by section 3875, that any of the parties may appeal from the order of condemnation by filing written notice of the appeal, and on such appeal the trial shall be *de novo*. In the court below the plaintiffs in error insisted that possibly section 3876 of the Code would in some way deprive them of property without due process of law, which we will consider later.

It then appears, by section 3878 of the Code, that the appellate court is required to again consider the application, and if granted, is required to have the damages and compensation assessed by a jury, and upon the payment of the damages so assessed, the court

is required to make an order of condemnation, in accordance with the application. Provision is made by section 2842 for appeal to the supreme court by any party, with provision that the appeal shall not deprive the condemnor of the right of entry.

Other provisions are made which need not here be referred to.

Prior to 1903 the Supreme Court of Alabama held that an appeal lay to that Court from the order of the court of probate granting the application of condemnation (Birmingham, etc., Co. vs. Birmingham Traction Co., 128 Ala 110); and at the same time the statute provided for an appeal to the circuit or city court of the county from the final decree of the probate court. In order to avoid the confusion resulting from the two systems of appeal, the Legislature, by the act of October 1, 1903 (General Acts of Alabama, 1903, page 374, section 6), amended section 1720 of the Code of 1896 by limiting the right of appeal to the circuit or city court, and postponing the appeal until the order of condemnation is made in the probate court, so that the entire case is removed by the simple process of appeal, for a trial *de novo* on the question of granting the application to condemn, with a jury to assess the damages. The legal right, therefore, of the condemnor is as much a question to be determined by the court as the matter of damages and compensation by the jury. In short, as said by the State court in the case at bar:

> "The statutory system for proceeding under eminent domain, Code sections 3860 *et seq.*, afford ample method and opportunity to contest and have determined every right involved and to contest every ruling or action of the trial court during the progress of the hearing and leading to its judgment. It cannot be anticipated or presumed that error favorable or unfavorable to any party will attend the progress of the contest through the Probate Court." (Record, page 35.)

In the several cases of Alabama Power Company against Hilyer, Keystone Lime Company, and Adams, reported in 67 So.

Rep. 720, 833 and 838, and Alabama Power Company against Carden, 66 So. 596, there were appeals from the probate court to the circuit courts, where, as will appear, the causes were severally tried *de novo*, and appeals taken to the Supreme Court. The Keystone case was a proceeding to condemn a right of way for the erection and maintenance of towers, poles and wire lines for the transmission of electricity, respecting which the Court said:

> "After the court made the order condemning the above strip, and before the trial in which the damages were assessed by the jury, the appellant, as under our constitution and statutes it had the right to do, placed its towers, poles and conductors on the strip and is now using it for the purposes for which it was condemned." (67 So. 833.)

Right to Take Possession Pending Proceeding

The question next presented by plaintiffs in error is whether section 3876 of the Code of 1907 is beyond the power of the State because it authorizes in condemnation cases the taking possession prior to the final determination of the amount of compensation and payment thereof. This question is fully answered by the following opinions of this Court:

> Cherokee Nation *vs.* Southern Kansas Ry., 135 U. S. 641;
> Sweet *vs.* Rechel, 159 U. S. 380;
> Backus *vs.* Fort Street Union Depot Co., 169 U. S. 557;
> Williams *vs.* Parker, 188 U. S. 491.

In Cherokee Nation vs. Southern Kansas Ry. Co., *supra*, the Court said:

> "It is further suggested that the Act of Congress violates the Constitution in that it does not provide for compensation to be made to the plaintiff before the defendant entered upon these lands for the purpose of constructing its road over them. This objection to the Act cannot be sustained. The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not pro-

vide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty. In the present case the requirements of the Constitution have, in our judgment, been fully met. The third section provides that before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the company is required to pay into court double the amount of the award, to abide its judgment; and, that being done, the company may enter upon the property sought to be condemned, and proceed with the construction of its road. *We are of the opinion that this provision is sufficiently reasonable, certain and adequate to secure the just compensation to which the owner is entitled.*" (Our italics.)

Passing the other cases, which are to the same effect, we quote the following language from the opinion of Mr. Justice Brewer in Williams *vs.* Parker, *supra*:

"So far as the Federal Constitution is concerned, it is settled by repeated decisions that a State may authorize the taking of possession prior to any payment, or even final determination of the amount of compensation. In Backus *vs.* Fort Street Union Depot Co., 169 U. S. 557, 568, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445, 449, we said:

" 'Is it beyond the power of a state to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this Court in Cherokee Nation *vs.* Sou. Kansas R. Co., 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965, and Sweet *vs.* Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43. There can

be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid before any final determination thereof.'"

Thus we submit that the question is settled both under the provisions of the State and Federal Constitution against the contention of plaintiffs in error.

The fourth assignment of error presents in another form the question raised by the third assignment.

The fifth assignment, that the construction placed upon the statutes by the Supreme Court of Alabama is against common right, contains nothing of merit. The fundamental rights of the plaintiffs in error, so far as involved in this writ of error, are controlled and protected in this Court by the Fourteenth Amendment, and there is nothing in the case which can be brought within the terms of that amendment. No doctrine is recognized here on the idea of common right except such a view or conclusion as may at last be founded upon the Fourteenth Amendment. (Miller *vs.* Cornwall Railroad Co., 168 U. S. 131.)

The sixth assignment of error, respecting the right of the State to authorize the erection of dams upon the water courses without compensation to the State or Nation, raises a purely political question, with which this Court is not concerned. The entire system of laws has been upheld by the Supreme Court of Alabama, not only in the case at bar, but in the case of State of Alabama *ex rel.* Attorney General *vs.* Alabama Power Company, 176 Ala. 620, 58 So. 462. The laws evidence a well-settled policy of the State to encourage water power developments, and it is not for any litigant to say that a statute which does not provide compensation to the State is open to question, if, indeed, compensation could be exacted by the State. As respects the United States, its right to compensation is neither affirmed nor denied by the statutes of Alabama and could only result, if at all, from the exercise of the power of Congress to regulate commerce among the several States and in the regulation of that commerce to improve the navigable streams.

Until such power is exercised, the subject of compensation to the United States is not a question for review or discussion. Moreover, it is shown by the petition (R. p. 9), that the Tallapoosa River is a non-navigable watercourse, and a like reference is made to that river in the opinion of the Supreme Court of Alabama, on page 26 of the record.

The seventh assignment of error, that the manufacture, supply and sale to the public of power produced by water as the motive force is not a public purpose, is answered and disposed of by the Supreme Court of Alabama in this case, and this Court will not review that conclusion.

> Union Lime Co. *vs.* Chicago & N. W. R. Co., 233 U. S. 211;
> Falbrook Irrig. Dist. *vs.* Bradley, 164 U. S. 112;
> Clark *vs.* Nash, 198 U. S. 361;
> Strickley *vs.* Highland Boy Gold Mining Co., 200 U. S. 527;
> Offield *vs.* N. Y., N. H. & H. R. Co., 203 U. S. 372;
> Hairston *vs.* Danville & W. R. Co., 208 U. S. 598;
> Head *vs.* Amoskeag Mfg. Co., 113 U. S. 9.

In the case of Union Lime Co. *vs.* Chicago & Northwestern Ry. Co., *supra*, Mr. Justice Hughes, speaking for the Court, said:

> "The State, through its highest court, declares the use to be a public one, and we should accept its judgment, unless it is clearly without ground."

In Hairston *vs.* Danville & N. W. R. Co., *supra*, the Court said:

> "The condemnation of land in this case has been held by the courts of Virginia to be authorized by the Coustitution and laws of that State, and we have no right to review that aspect of the decision. The law of Virginia permits no exercise of the right of eminent domain except for public uses. * * * * Therefore it must be assumed that this taking was held to be for public uses, although there was no specific finding of the fact, but only a general judgment of condemnation. * * * * No case is recalled where this Court has condemned, as a violation of the Fourteenth Amendment, a

taking upheld by the State Court as a taking for public uses in conformity with its laws."

In the case of Head *vs.* Amoskeag Mfg. Co., *supra,* this Court considered a statute of New Hampshire, authorizing any person to erect and maintain on his own land a water mill and mill-dam upon and across a non-navigable stream, paying the owners of lands flowed damages assessed in a judicial proceeding, and held that the statute did not deprive them of their property without due process of law, in violation of the Fourteenth Amendment. In the course of the opinion, Mr. Justice Gray said:

> "It has been held in many cases of high authority that special Acts of incorporation, granted by the Legislature for the establishment of dams to increase and improve the water power of rivers and navigable waters, for mechanical and manufacturing purposes, are for public use . . .
>
> "Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other States, maintaining the validity of general Mill Acts as taking private property for public use, in the strict constitutional meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid, as a just and reasonable exercise of the power of the Legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without some such regulation could not be beneficially used."

In the light, therefore, of the holding by the Supreme Court of Alabama in the present and other cases, that the manufacture, supply and sale to the public of electric power generated by water as a motive force is a public use or purpose for which property may be taken under the power of eminent domain, there is, we submit, no question which can arise in this Court. There have been cases, such as those of Clark *vs.* Nash and Strickley *vs.* Highland Boy

Gold Mining Co., in which there were serious questions of the power of the State to authorize the exercise of the power of eminent domain for certain purposes. In the former case the Court said:

> "Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a State statute, we are always, where it can be fairly done, strongly inclined to hold with the State Courts, when they uphold a State statute providing for such condemnation."

Certainly the instant case does not even approach the extreme application of the doctrine which this Court recognized and sustained in the cast last cited. The use is expressly declared by the Alabama statute to be public. The corporation exercising the rights conferred by the law is under the statutory duty and obligation to the public to manufacture and sell electric current so produced by water as a motive force to any person or persons, municipal or other corporations, in the order in which requests or demands are made therefor, (Code, section 3636), and in addition, and independently of statute, such duty to serve the public exists. There need not be any peculiar condition of soil or climate, or other peculiarity of the State of Alabama to uphold the statute here involved. Water powers of great value are to be found in many of the States of the Union amounting approximately to 61,678,000 horse power, of which not exceeding 6,000,000 have been developed. (Report of Corporation Commissioner Herbert Knox Smith to the President, of March 4, 1912, pages 55 and 63). It is within the knowledge of all men that great progress has been made in this science within recent years, and that developments are being made and will in future be made on a colossal scale of the various unused water powers in the nation. Possibly no one subject is of such supreme importance at the present day, and of such value to

the people of the nation as the development of the water powers, and the resulting benefit is incapable of estimation. This is now a subject of common knowledge and of daily experience, as Mr. Justice McClellan pointed out in the opinion of the Supreme Court of Alabama, so that

> "where the object of the proposing condemnor is the production and distribution of electricity, as a motive power or agency, to the public, without discrimination, for the purpose of supplying power or heat, or other forces of a nature reasonably capable of promoting or affording a use or uses adapted to general comfort or convenience of all those who may desire them, *the use is public* within the purview of the sovereign authority of the State expressed in the phrase *the right of Eminent Domain;* and when authoritatively conferred by the State, the proposing condemnor may exercise such right, according to the forms of law prescribed therefor." (Record, page 26.)

The Supreme Court of Alabama referred to a number of cases which have sustained the principle that the furnishing of electricity to the public in such manner is a public use; and in addition to the cases cited in the opinion, and in the note to section 268 of Lewis on Eminent Domain, third edition, the following recent cases sustain the same principle: Lucas *vs.* Ashland Light, Mill & Power Co., 92 Neb. 550, 138 N. W. 761; Tuttle *vs.* Jefferson Power, etc., Co., 31 Okl. 710, 122 Pac. 1102; Wis. River Imp. Co. *vs.* Pier, 137 Wis. 325, 118 N. W. 857, 21 L. R. A. (N. S.) 538; Great Falls Power Co. *vs.* Webb, 123 Tenn. 584, 133 S. W. 1105; Hagerla *vs.* Miss. River Power Co., 202 Fed. 776; State *ex rel* Dominick *vs.* Superior Court (Wash.), 100 Pac. 317, 21 L. R. A. (N. S.) 448; Deerfield River Co. *vs.* Wilmington Power, etc., Co., 77 Atl. 862, 83 Vt. 548; Nolan *vs.* Central Georgia Power Co., 67 S. E. 656, 134 Ga. 201; *In re* Otter Tail Power Co., (Minn.), 151 N. W. 198; Pittsburg Hydro Elec. Co. *vs.* Liston, (W. Va.), 73 S. E. 86, 40 L. R. A. (N. S.) 602.

An examination of the various cases discloses that the question has been presented to the courts of last resort of sixteen of the States, and upheld in principle in every case, and in addition has been sustained in two of the district courts of the United States and in the Circuit Court of Appeals for the Ninth Circuit.

We therefore earnestly submit that it is not open to any sort of question that private property may be taken under the power of eminent domain when needed in connection with the manufacture, supply and sale to the public of electric power produced by water as a motive force.

THOMAS W. MARTIN,

LAWRENCE MACFARLANE,

RAY RUSHTON,

Attorneys for Defendant in Error.

APPENDIX.

Sections 23 and 235, Constitution of Alabama, 1901.

"SECTION 23. That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the Legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the Legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and provided that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association."

"SECTION 235. Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction. The Legislature is hereby prohibited from denying the right of appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise, but such appeal shall not deprive those who have obtained the judgment of condemnation from a right of entry, provided the amount of damages assessed shall have been paid into court in money, and a bond shall have been given in not less than double the amount of the damages assessed, with good and sufficient sureties, to pay such damages as the property owner may

sustain; and the amount of damages in all cases of appeals shall on demand of either party be determined by a jury according to law."

Article 19, Chapter 69, Code of Alabama, 1907.
Power Companies.

3627. *Power Companies; Additional Powers Conferred.*— All corporations organized under the general laws of this State or heretofore under a special act of the Legislature and all corporations organized under the laws of any other of the United States and which have complied with the Constitution and laws of the State of Alabama as to foreign corporations and which, by their charter, have the right to manufacture, supply and sell to the public power produced by water as a motive force, shall, after acquiring by purchase or otherwise than by condemnation a dam site or power site comprising not less than one acre of land upon each and opposite sides of any water course in addition to other powers conferred by law have the following rights, powers, and authority:

To acquire by condemnation the lands and rights necessary for the construction and operation of said dam and works connected therewith or useful thereto, either up or down stream therefrom, and (in the case of non-navigable streams) to construct and operate at said site or other point up or down the stream therefrom and across said stream a dam, together with all works incident, necessary, or related thereto, and in connection therewith to impound or divert water of any water course or water courses of this State, and to raise higher such dam and to enlarge the works necessary, related or incident thereto, and to construct other works necessary, related or incident thereto, either up stream or down stream therefrom, as may be required or deemed expedient by such corporation in the manufacture and supply of power produced by water as a motive force.

To acquire by condemnation all lands or waters or interests or rights or easements in lands or waters likely or liable to be flooded or damaged by impounding or diverting the water of any water course in this State or its tributaries or necessary for the construc-

tion or operation of dams or power houses or works necessary, incident or related thereto, or likely or liable to be flooded or damaged by the construction or operation or enlargement of the dams or works incident, necessary, or related thereto, or damaged or taken in the construction, operation, or use of canals, tail races, or exit ways necessary, useful, or convenient for the escape, conveyance, or return of the water used in the operation of the works or power plant.

To acquire by condemnation the necessary lands for sub-stations and transmission lands, but shall have no right to condemn a private residence, nor the out house, garden, nor orchard within the curtilage of a private residence, for a sub-station site or for rights of way for its transmission line or lines. Such corporation shall have no right to condemn lands, water, or water rights in use for power purposes by another corporation upon the same water course having similar powers and essential to its operation; or lands, water, or water rights held by such other corporation for power purposes where the lands, water, or rights in themselves and taken alone or in connection with other lands, water, or rights owned by such other corporation, can be made the reasonable basis of a water power development of at least one thousand continuous horse power; but may condemn lands, hydraulic structures, water, or water rights held by such other corporation at any point upon the same water course, unless the lands, structures, or rights in themselves and taken alone or in connection with other lands or rights owned by such other corporation can be made the reasonable basis of a water power development of at least five hundred continous horse power, and may condemn lands, hydraulic structures, water, or water rights of such other corporation, at any point upon the same water course, in excess of such other corporation's actual facilities for using the same (independently of the actual or proposed works of the condemning party) for the manufacture of power by its plant as the same is already established at the time the condemnation proceeding is begun, provided the plant of such other corporation has been in operation for

five years or more preceding the commencement of the condemnation proceedings. Nor shall such corporation have the right to condemn the lands, hydraulic structures, water, or water rights of any cotton factory, at any point upon the same water course, in actual and prior use by it for the operation of its plant; but may condemn the lands, hydraulic structures, water, or water rights of such cotton factory in excess of what is actually in use, or may be used at normal stages of the stream, for the operation of its plant as already established at the time the condemnation proceeding is commenced. Such corporation may by condemnation acquire the right to flood grist mills and industries in conjunction therewith, together with lands and water rights appertaining thereto. In all cases just compensation shall first be paid to the owner in the manner provided by law for all property taken.

3628. *To Flood Ferries.*—Such corporation shall also have the right and authority to acquire by condemnation the right to flood public and private ferries and the approaches thereto, but said corporation in the event of acquiring said property by condemnation, shall relocate and place public ferries and the approaches thereto in a condition satisfactory to the court of county commissioners or board of revenue of the counties in which said public ferries are located.

3629. *Right to Flood Roads.*—Such corporations shall have the right and authority to acquire by condemnation the right to flood private roads, and shall have the right to flood public roads by paying to the court of county commissioners or board of revenue of counties in which public roads are, the cost of locating, laying out, and opening other public roads in lieu of and to the same extent as the public roads flooded or intended to be flooded.

3630. *Right of Way.*—Such corporation shall have the right and authority to acquire by condemnation, ways, and rights of way not exceeding a width of one hundred feet for the total length of such rights of way upon which to erect tower, pole, or wire lines for the manufacture, supply, and sale of power produced by water

as a motive force, provided such corporation shall have no right without consent to construct and operate tower, pole and wire lines upon the right of way of any steam or electric railroad, telegraph, or telephone company, except to cross the same; and provided such corporation shall have no right without consent to construct and operate tower, pole and wire lines upon the right of way of another corporation having the power to manufacture, supply, and sell power, produced by water as a motive force, except to cross the same.

3631, *Use of Public Roads.*—Such corporations shall have the right and authority to erect and operate tower, pole, and wire lines across, along, and on public roads, subject to the regulation of the court of county commissioners or board of revenue of the counties in which said roads are located.

3632. *Incidental Rights in Construction.*—Such corporations shall have the right and authority to acquire by condemnation ways and rights of way, not exceeding a width of one hundred feet, for the total length of such rights of way, for the purpose of constructing earth, steam, and electric roads for the transportation of material, equipment and supplies required or useful in the construction, operation and maintenance of the said dam and works incidental and necessary thereto.

3633. *Removal of Timber from Right of Way.*—Such corporation shall have the right and authority to clear and remove from rights of way and from lands likely and liable to be flooded, all timber and other growth, and the right and authority to remove outside of said rights of way such timber as may injure or endanger by shading, falling, or otherwise, any of its works, and for that purpose may acquire such timber by condemnation.

3634. *Authority to Erect Dams.*—Any dam erected in accordance with the provisions of this statute shall be considered a dam authorized by the Legislature of this State at the particular site selected and of the specific height and dimensions determined upon.

3635. *Shall Have Powers Conferred Upon Other Public Service Corporations.*—Such corporations and public utility corporations shall have and exercise all the rights, powers and privileges now and hereafter conferred upon public utility corporations.

3636. *Duty to Serve the Public.*—Any corporation which exercises any of the rights conferred by this article shall, after the completion of its works and plants, be under the duty and obligation to the public to manufacture and sell to the public electric current produced at its plants, and any corporation manufacturing, selling, and supplying power, heat, light, or electricity produced by water as a motive force under the provisions of this article, must sell such power, heat, light or electricity to any person or persons, municipal or other corporations, in the order in which requests or demands are made for such light, heat, power, or electricity. Nothing herein, however, shall be construed to require any such corporation to furnish light, heat, power, or electricity to any person or persons, corporation or corporations, until satisfied of his or its financial responsibility, and except in conformity with its reasonable rules and regulations and reasonable prices for the same, and except as far as the capacity of its plant will permit.

3637. *Procedure for Condemnation.*—The procedure for condemnation under this article shall be in the manner provided for the condemnation of lands and rights of way for public use, in article 1 (1), chapter 79 (42), of the Code; or, at the option of the condemning party, in the manner provided in any other statute conferring the power of eminent domain on public utility corporations.

Article 1, Chapter 79, Code of Alabama, 1907.

Eminent Domain.

3860. (1712) (3207) (3580) *Application to Court Probate for Order of Condemnation.*—Any county, municipality or corporation organized under the laws of this State, or any person,

or association of persons, proposing to take lands, or to acquire an interest or easement therein for any uses for which private property may be taken, may, if there be no other mode of proceeding prescribed by law, apply to the Court of Probate of the county in which such lands, or a material portion thereof, may be situate, for an order of condemnation thereof to such uses.

3861. (1713) (3208) *Application and Contents.*—The application must be in writing, verified by the oath of the applicant, or by the oath of an agent or attorney, and accompanied with security for the costs, and must state with certainty the name and residence of the applicant, the uses or purposes for which the land is to be taken, and the interest or easement therein to be acquired. Where there are several tracts of land lying within one county of which portions are proposed to be taken or in which an interest or easement is proposed to be acquired, the applicant may join them all in separate paragraphs in the same application, and must describe the several tracts and state the names and residence of the owners of each tract, if known, or if unknown, must show that reasonable diligence has been used to ascertain the same.

3862. (1714) (3209) *Order of Court on Filing Application; Notice*—On the filing of the application the Court must make and enter an order appointing a day for the hearing thereof, and must issue to all the owners of such lands as reside in the State, notice of the application and of the day for the hearing thereof, which must be served by the sheriff or other legal officer, at least ten days before the day apopinted for the hearing; if any of the owners be unknown, or if they reside out of the State, notice to them must be given by advertisement in some newspaper published in the county, or if there be no newspaper published in the county, by posting notice at the court house door and three other public places, for at least three weeks before the day appointed for the hearing. If any of the owners be infants or persons of unsound mind, notice must be served on their guardian, if they have any resident in the State, but if they reside in the State and have no

such guardian, then upon the persons who have them in charge, or with whom they reside. If any of the owners be dead, and the lands are in the possession or under the control of the personal representatives of such deceased owners, notice must be served on such representatives and on the heirs at law of the decedents.

3863. (1715) (3213) *Infants; Persons of Unsound Mind.*—If the owner of the lands be an infant, or is of unsound mind, the Court, on the day appointed for the hearing, must appoint a guardian *ad litem* to represent him; and the guardian so appointed must file a written acceptance of the appointment, must appear and protect the rights and interests of such infant, or person of unsound mind; and, if he deems it necessary, may employ counsel to assist him; the compensation of such guardian and of his counsel must be ascertained by the Court and taxed as costs of the proceeding.

3864. (1716) (3214) *Owner Not Appearing.*—If the owner does not appear on the hearing of the application, the Court must hear the same, and if the application be granted, must appoint commissioners as herein provided for, and thereafter the same proceedings shall be had as if such owner had appeared.

3865. (1717) (3211) *Allegations, Objections, and Proof to Be Heard.*—On the day appointed, or any other day to which the hearing may be continued, the Court must hear the allegations of the application, and any objections which may be filed to the granting thereof, and any legal evidence touching the same, and shall make an order granting or refusing the application.

3866. *Several Distinct Tracts in One Application.*—If there are several distinct tracts of land owned by different persons embraced in the application, the owners of each tract may have a separate hearing as to the right to condemn their lands, and the Court may, if it finds that the application should be granted as to some and not as to other of the owners, make and enter its decree accordingly.

3867. *Property Already Devoted to Public Use, How Condemned.*—If the property sought to be condemned, or any portion thereof, or interest therein, has already been subjected or devoted to a public use, such land or portion thereof, or interest therein, shall not be taken for another and different character of public use unless an actual necessity for the specific land or portion thereof or interest therein shall be alleged and proven, and unless it be alleged and proven that such other and different character of public use will not materially interfere with the public use to which such property is already subjected or devoted.

3868. *Hearing Conducted as in Civil Cases.*—The hearing herein provided must in all respects be conducted and evidence taken as in civil cases at law.

3869. (1718) (3211) *Commissioners Appointed; Qualifications Of.*—If the application be granted, in whole or in part, the Judge of Probate must appoint three citizens of the county in which the lands sought to be condemned are situated, who shall possess the qualifications of jurors, who shall be disinterested, and who shall file a certificate along with their award that neither of them had ever been consulted, advised with, or approached by any person in reference to the value of the lands, or the proceedings to condemn the same prior to the assessment of damages, and that they knew nothing of the same prior to their appointment; and the Judge of Probate is authorized to fill any vacancy occasioned by death, failure to act, or any disqualification of any such commissioners from interest, prior knowledge of the subject-matter, or being consulted with, advised with, or approachd in reference to the condemnatitn of such lands, prior to appointment or assessment of the damages.

3870. *Notice of Appointment. Service Of.*—When the Court shall have appointed the commissioners as herein provided, it shall at once issue a notice of the appointment to the sheriff, who shall serve such notice upon the person designated therein within five

days of the receipt thereof, and the sheriff shall receive the same compensation for serving such notice as allowed for summoning jurors.

3871. *Damages Assessed; Duties of Commissioners in Assessing.*—The commissioners thus appointed, or a majority of them, shall assess separately the damages and compensation to which the several owners of each of the several tracts of land are entitled, and they shall be sworn as jurors are sworn. The commissioners may view the lands to be subjected, and must receive all legal evidence offered by any party touching the amount of damages the owners of the lands will sustain and the amount of compensation they are entitled to receive.

3872. *Damages Not Reduced or Diminished Because of Incidental Benefits.*—The amount of compensation to which the owners are entitled must not be reduced or diminished because of any incidental benefits which may accrue to them, or to their remaining lands in consequence of the uses to which the lands to be taken, or in which an easement is to be acquired, will be appropriated. Declaratory only.

3873. *Appearance of Parties and Attorneys.*—Any person interested in the proceedings may be present in person or by attorney at any of the proceedings or trials provided for in this article.

3874. (1719) (3212) *Report of Commissioners.*—The commissioners must, within twenty days from their appointment, make a report in writing to the Court, stating he amount of damages and compensation ascertained and assessed by them for the owners of each tract of land or persons injured, and thereupon the Court must order the same to be recorded, and must make orders of condemnation in pursuance thereof upon the payment of the damages and compensation so assessed and reported or the deposit of the same in Court.

3875. (1720) (3215) *Appeal to Circuit or City Court.*—Any of the parties may appeal from the order of condemnation to the circuit or city court of the county within thirty days after the making of the order of condemnation, by filing in the court rendering the judgment a written notice of appeal, a copy of which shall be served on the opposite party, or his attorney, and on such appeal the trial shall be *de novo* and it shall be necessary to send up the proceedings only as to the parties appearing or against whom an appeal is taken.

3876. *Judgment Not Suspended by Appeal if Damages Paid Into Court and Bond Given.*—No appeal shall suspend the judgment or deprive the applicant of the right of entry, provided the amount of the damages assessed for the parties who appeal or against whom an appeal is taken, shall have been paid into court in money and a bond shall have been given in double the amount of such damage, with good and sufficient sureties, to pay such damages as the property owners may sustain.

3877. *Separate Bonds in Case of Joint Appeals.*—In case more than one land owner appeals, or appeal is taken against more than one, there shall be separate bonds given, as above provided, to each one so appealing or appealed against.

3878. *Applicant May Appeal Upon Giving Security for Costs.*—If the Probate Court refuses to grant the application the applicant shall have a right of appeal to the like court upon giving security for costs, to be approved by the Judge of Probate, and upon such appeal the trial shall be *de novo*. Upon any appeal taken to the circuit court or court of like jurisdiction under this section, if such court determines that the application should be granted, it shall proceed forthwith to have the damages and compensation assessed by a jury.

3879. *Order of Condemnation on Appeal.*—Upon the payment to the owner of the damages so assessed, and the payment of costs of suit into court, or upon the payment of damages and costs

of suit into court, the court shall make an order of condemnation in accordance with the application upon the trial in the court to which the appeal is taken.

3880, *Bills of Exceptions.*—Either party may, by bill of exceptions, reserve any ruling or decision of the Court as in other cases.

3881. *Appeal to Supreme Court.*—After final judgment in the circuit court or court of like jurisdiction, any party may, within thirty days thereafter, upon giving bond or security for costs, as in other cases, appeal to the Supreme Court.

3882. (1721) (3216) *Order of Condemnation; Effect of Appeal.*—The order of condemnation upon the payment of the sum ascertained and assessed by the verdict of the jury, or the deposit thereof in court for the defendant, shall vest in the applicant the easement proposed to be acquired for the uses and purposes stated in the application, and for no other uses or purposes. But if an appeal shall be taken by either party, then the person, corporation, or association seeking to acquire such right of way, upon the deposit in the court, for the party whose land is sought to be condemned, of the amount of damages and compensation so assessed, together with the costs of the proceeding, shall be entitled to enter upon the lands so condemned, and survey, construct, and operate on the same for the uses and purposes stated in the application but such easement shall not vest absolutely in such person, corporation, or association until the final determination of the cause and the payment or deposit in court of such damages and compensation as shall then be adjudged.

3883. (1722) (3218) *Time Within Which Damages to Be Paid; Effect of Failure to Pay.*—The applicant may pay the damages and compensation assessed at any time within six months after the assessment thereof, or, in case an appeal is taken, within six months after the appeal is determined, but if he fails to pay the

same within such time, such assessment shall cease to be binding on the owner of the lands, and the rights of the applicant thereunder shall determine; and upon such failure applicant shall be liable to the owner for all damages the latter may have sustained by the institution of such proceedings, including a reasonable attorneys' fee for defending the same.

3884. (1723) (3219) *Foreign Telegraph and Telephone Company.*—A telegraph or telephone company, incorporated under the laws of another State, proposing to extend connecting lines into this State, may acquire an easement for the uses and purposes of such connecting lines, and may pursue the mode of proceeding prescribed in this article.

3885. (1724) (3220) *Railroad Crossings.*—Any corporation, person, or association of persons owning a railroad or street railroad in this State and proposing to cross or intersect the line of another railroad or street railroad, may acquire an easement for such purpose, and to that end may pursue the mode of proceeding prescribed in this article.

3886. (1725) (3217) *Costs.*—The costs of the application and proceedings thereunder, including the compensation of commissioners, who shall receive the pay of jurors, must be adjudged and assessed against the applicant and his surety for costs, for which execution may issue. But should the applicant tender to the land owner, prior to the application for condemnation, a sum of money in excess of that awarded by the commissioners, which tender he has kept good until the time of trial by paying the same into court to await the result of the proceeding, in which case the cost of the proceedings shall be taxed against the land owner; but the commissioners awarding damages shall have no knowledge of the amount so tendered, and shall so certify in their award.

3887. (1726) (3220) *Court of Probate Open at All Times.*—The Court of Probate must be deemed always open for the filing and trial of all applications made under this article.